

This Opinion Is Not a
Precedent of the TTAB

Hearing: June 17, 2021

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Gang Cao
v.
Apple, Inc.

Opposition No. 91239006

Marc C. Levy and Brigid C. Mahoney of Seed IP Law Group LLP for Gang Cao.

Dale M. Cendali and Mary Mazzello of Kirkland & Ellis LLP for Apple, Inc.

Before Bergsman, Lynch, and Johnson, Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Apple, Inc. (Applicant) seeks registration on the Principal Register of the mark LIVE PHOTOS, in standard character form, for “computer software for recording and displaying images, video and sound,” in International Class 9.¹ Applicant disclaimed the exclusive right to use the word “Photos.”

¹ Serial No. 86868731 filed January 7, 2016, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant’s claim of first use of its mark anywhere as of September 9, 2015, and first use of its mark in commerce as of September 25, 2015.

Gang Cao (Opposer) opposes the registration on the ground that LIVE PHOTOS is generic and, in the alternative, if LIVE PHOTOS is not generic then it is merely descriptive and it has not acquired distinctiveness.

Applicant, in its Answer, denies the salient allegations in the Notice of Opposition. In addition, Applicant raised several affirmative defenses. Some of its “affirmative defenses” are simply amplifications of its denials and are not true affirmative defenses. With regard to remaining affirmative defenses, because Applicant did not discuss them in its trial brief, Applicant has waived them. *See Swiss Watch Int’l Inc. v. Fed’n of the Swiss Watch Indus.*, 101 USPQ2d 1731, 1734 n.4 (TTAB 2012) (affirmative defenses deemed waived where no mention of them in trial brief); *Barbara’s Bakery Inc. v. Landesman*, 82 USPQ2d 1283, 1292 (TTAB 2007) (where applicant did not argue the affirmative defense of equitable estoppel in her brief, the affirmative defense was given no consideration). We, therefore, do address any of Applicant’s “affirmative defenses.”

I. Evidentiary Issues

A. Improper rebuttal

During Opposer’s rebuttal testimony period, Opposer introduced four notices of reliance on Internet evidence “for the purpose of showing generic and/or descriptive use of the term ‘live photo(s)’ with respect to photos or images that incorporate motion or animation, as used by third party cell phone manufactures or wireless phone carriers,”² “by third party cell phone or table manufacturers or retailers, and

² 66 TTABVUE 2.

reviewers or writers discussing such products,”³ and “by third party Android app developers, and in connection with the Google Pixel phone.”⁴ In addition, Opposer introduced “certified cover pages for [patent] application nos. 62/207385, 62/253136, and 62/256136” “for the purpose of showing Applicant has standing,”⁵ and Internet copies of “Applicant’s opposed trademark applications in the Canadian Intellectual Property Office (CIPO), and a decision from the European Union Intellectual Property Office (EUIPO) adverse to Applicant, both of which touch upon the issue of the generic and/or descriptive nature of the term ‘live photo(s)’ with respect to photos or images that incorporate motion or animation.”⁶

Applicant objects to these notices of reliance, inter alia, on the ground that the evidence in the notices of reliance comprises improper rebuttal.⁷ In opposition to Applicant’s objection, Opposer argues that the above-noted notices of reliance are not improper rebuttal.

During its rebuttal period, a party may introduce facts and witnesses to “to explain, repel, counteract, or disprove the evidence of the adverse party.” *Apollo Med. Extrusion Techs., Inc. v. Med. Extrusion Techs., Inc.*, 123 U.S.P.Q.2d (BNA) 1844, 1847 (T.T.A.B. 2017). The evidence [Opposer] introduced in the rebuttal period is proper as intended to

³ 67 TTABVUE 2. *See also* 71 TTABVUE 2.

⁴ 68 TTABVUE 2.

⁵ 69 TTABVUE 2.

Our decisions have previously analyzed the requirements of Sections 1063 and 1064 under the rubric of “standing.” We now refer to this inquiry as entitlement to a statutory cause of action. Despite the change in nomenclature, our prior decisions and those of the Federal Circuit interpreting “standing” under §§ 1063 and 1064 remain applicable.

⁶ 65 TTABVUE 2.

⁷ Applicant’s Brief, pp. 33-34 (74 TTABVUE 36-37).

explain, repel, counteract, or disprove [Applicant's] arguments and evidence that uses of "live photos" as generic or descriptive were either *de minimis*, from only non-U.S. sources, or didn't include the precise term "live photos" but rather only synonymous terms. [Opposer's] rebuttal evidence, including uses of the exact term "live photos" by major competitors and from U.S. sources, is thus proper to rebut Apple's evidence and arguments.⁸

Here, [Opposer] properly used the rebuttal period to "introduce facts and witnesses appropriate to deny, explain, or otherwise discredit the facts and witnesses adduced by the opponent." [*Am. Meat Inst. v. Horace W. Longacre, Inc.*, 211 USPQ 712, 719 (TTAB 1981)]. Further, "[t]he fact that evidence might have been offered in chief does not preclude its admission as rebuttal." *Apollo Med. Extrusion Techs., Inc.*, 123 U.S.P.Q.2d (BNA) 1844, 1847 (quoting *Data Packaging Corp. v. Morning Star, Inc.*, 212 U.S.P.Q. 109, 113 (T.T.A.B. 1981)). Regardless, it is within the Board's discretion "to consider improper rebuttal evidence, particularly when an objecting party fails to demonstrate that the evidence raises new or surprising issues or any prejudice resulting from the failure." Here, even if [Opposer's] rebuttal evidence was improper (which it is not), [Opposer] did not include evidence in his rebuttal period that would surprise or otherwise prejudice [Applicant].⁹

The burden is on Opposer, in the first instance, to come forward during its own testimony period with proof of the essential elements of its claims, including that the term LIVE PHOTOS is generic, merely descriptive, and has not acquired distinctiveness. *Wet Seal, Inc. v. FD Mgm't, Inc.*, 82 USPQ2d 1629, 1632 (TTAB 2007). Opposer may not use its rebuttal period to submit testimony or other evidence that

⁸ Opposer's Reply Brief, p. 12 (75 TTABVUE 18).

⁹ Opposer's Reply Brief, p. 13 (75 TTABVUE 19).

is properly part of its case-in-chief. *Jules Jurgensen/Rhapsody, Inc. v. Baumberger*, 91 USPQ2d 1443, 1445 n.5 (TTAB 2009). *See also* Trademark Rule 2.121(b)(1), 37 C.F.R. § 2.121(b)(1) (“The Trademark Trial and Appeal Board will schedule a testimony period for the plaintiff to present its case in chief, a testimony period for the defendant to present its case and to meet the case of the plaintiff, and a testimony period for the plaintiff to present evidence in rebuttal.”).

We sustain Applicant’s objection to Opposer’s rebuttal notices of reliance to the extent that we will consider the rebuttal evidence only if it rebuts Applicant’s evidence (e.g., the Internet evidence is directed to a foreign market, the term “Live Photo(s) is not currently being used in the Internet evidence, the third party is not displaying the term “Live Photo(s), etc.) but not for the purpose of supporting Opposer’s case-in-chief. *See Helene Curtis Indus. Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618, 1625 n.33 (TTAB 1989) (finding opposer’s rebuttal survey bears on the validity and probative value of applicant’s survey and, therefore, considered to rebut applicant’s survey but not to support opposer’s case-in-chief).

B. Numerous objections

Applicant lodged numerous objections to the testimony and evidence Opposer introduced. Applicant raised a number of objections, based on hearsay, lack of probative value, unfair prejudice, etc. We do not address in detail these objections, many of which go to the weight rather than the admissibility of this evidence. Administrative Trademark Judges are not lay jurors who might easily be misled, confused, or prejudiced by irrelevant evidence hear Board proceedings. *Cf. Harris v.*

Rivera, 454 U.S. 339, 346 (1981) (“In bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions.”). Mindful of the objections, we have accorded this evidence whatever probative value we deem appropriate. *See Spiritline Cruises LLC v. Tour Mgm’t Servs., Inc.*, 2020 USPQ2d 48324, *2 (TTAB 2020); *Milwaukee Electric Tool Corp. v. Freud America, Inc.*, 2019 USPQ2d 460354, at *4 (TTAB 2019) (declining to individually address numerous objections that go to weight rather than admissibility, noting that the Board is capable of weighing the relevance or the strength or weakness of the evidence and according it appropriate probative value), appeal docketed, No. 20-cv-109 (M.D.N.C. Feb. 3, 2020); *Luxco, Inc. v. Consejo Regulador del Tequila, A.C.*, 121 USPQ2d 1477, 1479 (TTAB 2017).

II. The Record

The record includes the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of Applicant’s application.

A. Opposer’s Testimony and Evidence.

1. Notice of reliance on online dictionary definitions of “Live,” “Life,” and “Photograph”;¹⁰
2. Notice of reliance on printed Internet publications purportedly to show generic or descriptive use of term “live photo(s)”;¹¹
3. Notice of reliance on a copy of Applicant’s U.S. Patent Application No. US 2017/0109596 A1 purportedly to show generic or descriptive use of the term “live photo(s)”;¹²

¹⁰ 33 TTABVUE.

¹¹ 34 TTABVUE.

¹² 34 TTABVUE 154-166.

4. Notice of reliance on printed Internet publications purportedly to show generic or descriptive use of the term “live photo(s)” and “synonymous terms with respect to photos or images that incorporate motion or animation”;¹³
5. Notice of reliance on printed Internet publications purportedly to show generic or descriptive use of the term “live photo(s)” and “synonymous terms with respect to photos or images that incorporate motion or animation”;¹⁴
6. Notice of reliance on printed Internet publications purportedly to show generic or descriptive use of the term “live photo(s)” and “synonymous terms with respect to photos or images that incorporate motion or animation”;¹⁵
7. Notice of reliance on printed Internet publications purportedly to show generic or descriptive use of the term “live photo(s)” and “synonymous terms with respect to photos or images that incorporate motion or animation”;¹⁶
8. Opposer’s testimony declaration;¹⁷
9. Applicant’s cross-examination deposition of Opposer by written question;¹⁸ and
10. Opposer’s rebuttal notices of reliance discussed above.

B. Applicant’s Testimony and Evidence.

1. Testimony declaration of Thomas R. La Perle, Applicant’s Legal Department Senior Director;¹⁹

¹³ 35 TTABVUE.

¹⁴ 36 TTABVUE.

¹⁵ 37 TTABVUE.

¹⁶ 38 TTABVUE.

¹⁷ 39 and 41 TTABVUE.

¹⁸ 48 TTABVUE.

¹⁹ 49 and 54 TTABVUE.

2. Opposer's cross-examination deposition of Thomas R. La Perle;²⁰
3. Testimony declaration of Erika Dillon, Senior Paralegal for Applicant's counsel, authenticating LexisNexis publications posted on 52 and 53 TTABVUE;²¹
4. Testimony affidavit of Elizabeth Rosenberg, Records Request Processor at the Internet Archive;²²
5. Notice of reliance on printouts from Applicant's website, printouts from YouTube videos, printouts from Internet websites;²³ and
6. Notice of reliance on Opposer's responses to Applicant's first set of requests for admission.²⁴

III. Entitlement to a statutory cause of action

Opposer's entitlement to a statutory cause of action, formerly referred to as "standing" by the Federal Circuit and the Board, is an element of the plaintiff's case in every inter partes case. *See Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277 (Fed. Cir. 2020)), *cert. denied*, ___ S. Ct. ___ (2021); *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d

²⁰ 63 TTABVUE. The Board posted the portions of the La Perle cross-examination testimony designated confidential at 64 TTABVUE.

²¹ 50 TTABVUE.

²² 51 TTABVUE.

²³ 52 and 53 TTABVUE.

²⁴ 53 TTABVUE 12-26. A party may introduce only an admission to a request for admission through a notice of reliance. Trademark Rule 2.120(k)(3)(i), 37 C.F.R. § 2.120(k)(3)(i). A denial or statement that the responding party cannot respond to the request does not establish the truth or falsity of the assertion, but rather leaves the matter for proof at trial. *Life Zone Inc. v. Middleman Grp. Inc.*, 87 USPQ2d 1953, 1957 n.10 (TTAB 2008) (denials to requests for admission inadmissible because "unlike an admission (or a failure to respond which constitutes an admission), the denial of a request for admission establishes neither the truth nor the falsity of the assertion, but rather leaves the matter for proof at trial."). As such, we have considered only the admissions to the requests for admission.

10837 (Fed. Cir. 2020); *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014). To establish entitlement to a statutory cause of action, a plaintiff must demonstrate: (i) an interest falling within the zone of interests protected by the statute and (ii) a reasonable belief in damage that is proximately caused by the registration of a mark. *Corcamore*, 2020 USPQ2d 11277 at *4. *See also Empresa Cubana*, 111 USPQ2d at 1062; *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999); *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (TTAB 1982).

When challenging a term as descriptive or generic, a plaintiff may establish its entitlement to a statutory cause of action by showing that it is engaged in the sale or offering of goods the same as or related to those covered by the challenged mark. *See Eastman Kodak Co. v. Bell & Howell Document Mgmt. Prods. Co.*, 23 USPQ2d 1878, 1879 (TTAB 1992), *aff'd*, 994 F.2d 1569, 16 USPQ2d 1912 (Fed. Cir. 1993); *Binney & Smith Inc. v. Magic Marker Indus., Inc.*, 222 USPQ 1003, 1010 (TTAB 1984).

Applicant is seeking to register its purported mark LIVE PHOTOS for “computer software for recording and displaying images, video and sound.”

The LIVE PHOTOS software feature combines the user’s photograph with video and sound. When a user takes a photograph with the LIVE PHOTOS feature, the user’s device captures what happens a second and a half before and a second and half after the photograph being taken, and pairs the still photograph with the simultaneously recorded video to create a new hybrid medium. When a

user presses and holds the still photograph, she sees the simultaneously captured recording.²⁵

... Live Photos is not just capturing the image, it's also displaying the image, so that - - that feature is also part of the - - of the applied-for goods and part of the Live Photos software, so it could be both. You could be viewing Live Photos on your Apple devices, iPhotos feature, but you can also be viewing multiple iPhoto - - you know, the resulting file on other devices, too.²⁶

Opposer testified that he has developed software that creates a similar effect as Applicant's software.

5. ... I developed software called "Full Screen Spin Browser" that works with a mouse device on desktop or laptop computers to animate static images by controlling the forward and backward advance of frames. By using a mouse device and "Full Screen Spin Browser," a user can put a set of static photos in motion by rotating the mouse wheel.

6. In addition to my "Full Screen Spin Browser" software, I developed a new kind of input device that incorporated a spinning wheel that a user could rotate in different directions and at various speeds. The direction and speed of rotation controlled the sequence and speed that the user viewed images on the computer to which the device was connected. I designed this device to be used with any Mac or PC computer via a USB port. My device works with many photos and video applications, including Apple Photos, Apple iMovie and Apple Quicktime.

²⁵ La Perle Testimony Decl. ¶11 (49 TTABVUE 4). *See also* La Perle Cross-Examination Dep., p. 22 (63 TTABVUE 26) ("The feature is intended to capture a still image, and then this, second half before and after the - - main photo.").

²⁶ La Perle Cross-Examination Dep., p. 30 (63 TTABVUE 34). Mr. La Perle also testified that "Live Photos" has an editing feature and a "Boomerang" functionality, a "kind of forward and back, and you can add loops to the photos." *Id.* at pp. 17-18 (63 TTABVUE 22-23).

8. The spinning wheel computer input devices and “Full Screen Spin Browser” software I developed work with a series of photos or video frames of a subject that is in motion. For example, a user might take a series of photos of a baseball pitcher making a pitch using burst mode, which captures a number of sequential photos of the pitcher throughout the full motion of the pitch. By using my device and my software, a user can quickly spin through the photos such that the pitcher appears to be in motion. In this way, my device and my software are capable of adding motion to still images, with the speed of spinning the wheel on the device dictating the speed of the motion observed in the images. This creates an effect for the viewer that is very similar to the effect created by the historic zoetrope machine. In addition, my devices can also be used to control video interactively by controlling video frames forward and backward. I also developed the web-based technology using HTML and JAVASCRIPT for the same function which does not require software download and installation.²⁷

In 2016, Opposer published his “SpinFun” app for use on an iPhone or iPad with the same functionality: users may browse photographs by spinning his/her finger on the screen of the phone. “The more quickly the user spins his or her finger, the more quickly the photos move.”²⁸ “[T]he SpinFun app can be used to add animation – i.e., life – to static photos.”²⁹

In 2017, Opposer developed “Spin Explorer” that provides the same functionality to video frames.

Using Spin Explorer, a user can turn static video frames into living or animated photos by using a spin gesture. A

²⁷ Opposer’s Testimony Decl. ¶¶5-6 and 8 (39 TTABVUE 5 and 7).

²⁸ Opposer’s Testimony Decl. ¶10 (39 TTABVUE 8).

²⁹ *Id.*

user spins clockwise to move video frames forward and spins counter-clockwise to move video frames backward.³⁰

Users may download SpinFun and Spin Explorer from Opposer's App Store.³¹

In anticipation of marketing his software, Opposer purchased the urls <livephoto.com> and <livephoto.ca>.³² However, upon learning Applicant adopted LIVE PHOTOS for its moving photograph feature, Opposer became concerned Applicant would object to Opposer's use of "Live Photo" to describe Opposer's software and he put his plans for using the <livephoto.com> and <livephoto.ca> urls on hold.³³

I wish to use "live photo" in its ordinary sense to refer to a feature of animating still images. I also wish to continue to use LIVEPHOTO.COM and LIVEPHOTO.CA as domain names to host websites where I advertise and promote products such as SpinFun, Spin Explorer, Spin Explorer 2, and future products that have the capability of adding life or animation to still images.³⁴

The software in Applicant's description of goods and the software and app that Opposer has developed and sells/licenses are so closely related, if not overlapping, that we may consider Applicant and Opposer competitors for purposes of our analysis. Thus, Opposer has a legitimate interest in preventing Applicant from gaining an alleged unfair competitive advantage by maintaining a registration for a purportedly generic or descriptive term for such software.

³⁰ Opposer's Testimony Decl. ¶11 (39 TTABVUE 8).

³¹ Opposer's Testimony Decl. ¶¶10-13 (39 TTABVUE 8).

³² Opposer's Testimony Decl. ¶13 (39 TTABVUE 8-9).

³³ Opposer's Testimony Decl. ¶¶14-15 (39 TTABVUE 9).

³⁴ Opposer's Testimony Decl. ¶16 (39 TTABVUE 9-10).

Applicant contends that Opposer's software does not compete with Applicant's software or serve as a substitute because Opposer's software does not "simultaneously take still photographs and short video clips and store them together as a hybrid medium. ... Rather, [Opposer's] apps allow users to scan through a series of distinct photographs and/or fast forward and rewind video with a spinning gesture."³⁵ However, the software does not have to be identical; it may be related. *Eastman Kodak*, 23 USPQ2d at 1879; *Binney & Smith*, 222 USPQ at 1010. The software of both parties creates the impression of moving photographs and, thus, has a similar purpose or function.

Applicant asserts that Opposer has presented no evidence or testimony that Opposer uses the term "Live Photos."³⁶ However, Opposer does not have to use the term at issue to establish its entitlement to a statutory cause of action. Opposer has a real interest in the proceeding because it has a present or prospective right to use "Live Photos" as a generic or descriptive term to describe its software. *Binney & Smith*, 222 USPQ at 1010. *See also Vigilance Committee Inc. v. Ullenberg Corp.*, 823 F.2d 490, 2 USPQ2d 2021, 2024 (Fed. Cir. 1987), *on remand*, 5 USPQ2d 1622 (TTAB 1987), *rev'd*, 853 F.2d 888, 7 USPQ2d 1628 (Fed. Cir. 1988) (in an opposition based on Section 2(e), an opposer need only assert an equal right to use the mark). For example, Opposer may want to advertise that his Spin Fun and Spin Explorer apps create live photos.

³⁵ Applicant's Brief, p. 51 (74 TTABVUE 53).

³⁶ Applicant's Brief, p. 51 (74 TTABVUE 53).

Applicant argues that Opposer's failure to use the <livephoto.com> and <livephoto.ca> urls undercuts its position that it has a real interest in this proceeding.

[Opposer] has owned the domains since 2011, yet these websites ***did not exist***, *i.e.*, had no content, until after Apple's high-profile announcement of the LIVE PHOTOS feature. (48 TTABVUE 146, 148–149 at 131:13–20; 133:23–134:5.) Instead, they automatically redirected visitors to a different website, create.ca, owned by a different entity, where they were listed ***for sale***. (48 TTABVUE 152–153 at 137:14–138:4; 48 TTABVUE 471; 51 TTABVUE 5–11.) This is in spite of the fact that [Opposer] purportedly created his spin browser feature in or around 2012. (39 TTABVUE 5–6 ¶ 6.).³⁷

Opposer testified on cross-examination that he never tried to sell the domain names <livephoto.com> or <livephoto.ca>.³⁸ Opposer explained that the webpage where the <livephoto.com> url was offered for sale refers to the url's previous owner³⁹ and that Opposer experienced technical difficulties getting the <livephoto.com> and <livephoto.ca> urls from redirecting to another website.⁴⁰ *Compare Philanthropist.com, Inc. v Gen. Conference Corp. of Seventh-Day Adventists*, 2021 USPQ2d 643, *7 (TTAB 2021) (petitioner's "business practice is to register domain names, hold them for a year or two, and let the registrations go un-renewed if there is no re-sale interest.").

Finally, Applicant argues that Opposer does not have a reasonable basis for its belief that it will be damaged by the registration of Applicant's purported mark LIVE

³⁷ Applicant's Brief, p. 51 (74 TTABVUE 53).

³⁸ Opposer's cross-examination testimony dep., p. 125 (48 TTABVUE 140).

³⁹ Opposer's cross-examination testimony dep., pp. 140-141 (48 TTABVUE 155-156).

⁴⁰ Opposer's cross-examination testimony dep., pp. 142-147 (48 TTABVUE 157-162).54).

PHOTOS because Opposer has been offering his SpinFun and Spin Explorer apps for sale since 2017 without having to use the phrase “live photo(s).”⁴¹ Because Applicant argues in this proceeding that its purported mark LIVE PHOTOS is inherently distinctive, Opposer has a reasonable basis for its belief that Applicant will prevent Opposer from using the term “live photo(s)” as a generic or descriptive term.

We find that Opposer has a legitimate interest in preventing Applicant from gaining an alleged unfair competitive advantage by obtaining a registration for a purportedly generic or descriptive term for the applied-for software and that the registration of the applied-for term will damage Opposer if we find it to be generic or descriptive. Therefore, Opposer has proven its entitlement to a statutory cause of action.

IV. Whether “Live Photos” is generic.

“A generic name—the name of a class of products or services—is ineligible for federal trademark registration.” *Booking.com*, 2020 USPQ2d 10729, at *1. A generic term “is the common descriptive name of a class of goods or services.” *Royal Crown Co. v. Coca-Cola Co.*, 892 F.3d 1358, 127 USPQ2d 1041, 1045 (Fed. Cir. 2018) (quoting *H. Marvin Ginn Corp. v. Int’l Ass’n of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986)). “The critical issue in genericness cases is whether members of the relevant public primarily use or understand the term to be protected to refer to the genus of goods or services in question.” *Royal Crown*, 127 USPQ2d at 1046 (quoting *Marvin Ginn*, 228 USPQ at 530).

⁴¹ Applicant’s Brief, p. 52 (74 TTABVUE 54).

The Federal Circuit has set forth a two-step inquiry to determine whether a mark is generic: First, what is the genus (category or class) of goods or services at issue? Second, does the relevant public understand the term sought to be registered primarily to refer to that genus of goods or services? *Marvin Ginn*, 228 USPQ at 530. The relevant public's perception is the chief consideration in determining whether a term is generic. *See Princeton Vanguard, LLC v. Frito-Lay N. Am., Inc.*, 786 F.3d 960, 114 USPQ2d 1827, 1833 (Fed. Cir. 2015); *see also Booking.com*, 2020 USPQ2d 10729, at *6 (“whether a term is generic depends on its meaning to consumers”). The parties may introduce evidence of the public's understanding of a term may from “any competent source, such as consumer surveys, dictionaries, newspapers and other publications.” *Id.* at 1830 (quoting *In re Northland Aluminum Prods., Inc.*, 777 F.2d 1556, 227 USPQ 961, 963 (Fed. Cir. 1985)); *accord Booking.com*, 2020 USPQ2d 10729, at *7 n.6.

Opposer's burden is to prove the public understands “Live Photo(s)” is a generic term by a preponderance of the evidence. *Princeton Vanguard*, 114 USPQ2d at 1830; *Magic Wand*, 19 USPQ2d at 1554.

A. Genus of the goods.

With respect to the first part of the *Marvin Ginn* inquiry, we may define the genus by the goods identified in the application: “computer software for recording and displaying images, video and sound.” *See In re Reed Elsevier Props. Inc.*, 482 F.3d 1376, 82 USPQ2d 1378, 1380 (Fed. Cir. 2007) (finding the description of services properly defined the genus of the services); *Magic Wand Inc. v. RDB Inc.*, 940 F.2d

638, 19 USPQ2d 1551, 1552 (Fed. Cir. 1991) (a proper genericness inquiry focuses on the identification set forth in the application or certificate of registration).

Applicant agrees that the description of goods properly defines the genus of goods at issue.⁴² Opposer, on the other hand, argues that we are not constrained to limit the genus to the description of goods in the application but that we look to the evidence of record to help us accurately define the genus.⁴³ *See In re Katch, LLC*, 2019 USPQ2d 233842, *4 (TTAB 2019) (genus includes activities rendered by applicant even though those activities were not included in the identification of services); *In re DNI Holdings Ltd.*, 77 USPQ2d 1435, 1437 (TTAB 2005) (the Board is not required to “turn a blind eye to the reality” of what goods applicant identifies by the term at issue).

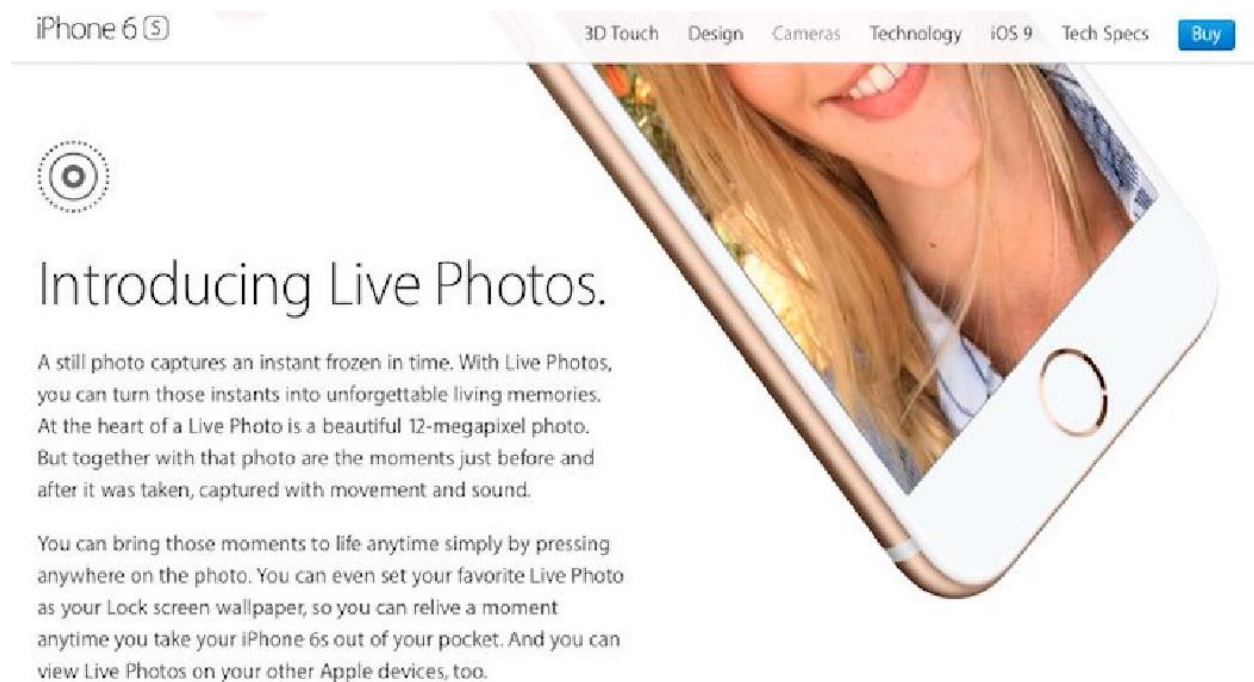
In *DNI Holdings*, the Board held that the genus of the services included wagering on sporting events despite applicant’s omission from its recitation of services activities related to wagering. *Id.* at 1439. *See also In re Steelbuilding.com*, 415 F.3d 1293, 75 USPQ2d 1420, 1422 (Fed. Cir. 2005) (finding the Board did not correctly describe the genus of goods and services offered by the applicant because the Board failed to include the interactive design feature of applicant’s goods and services that were not included in the identification of services); *Reed Elsevier*, 82 USPQ2d at 1380 (affirming that applicant’s provision of information regarding the law, legal news and

⁴² Applicant’s Brief, pp. 33-34 (74 TTABVUE 35-36).

⁴³ Opposer’s Brief, pp. 12-13 (72 TTABVUE 19-20).

legal services necessarily includes providing information about lawyers notwithstanding applicant's deletion of those services from its recitation.).

Applicant identifies its specimen of use filed with the application as a “screen shot of applicant's website showing use of the mark in close proximity to a buy now button.” We reproduce below the specimen submitted by Applicant.



The specimen displays LIVE PHOTOS to identify “computer software for recording and displaying images” and LIVE PHOTO to identify the megapixel photograph produced by the LIVE PHOTOS software. There is no evidence in the record indicating consumers perceive any material difference between the singular LIVE PHOTO and the plural LIVE PHOTOS. *See, e.g., In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632, 1637 (Fed. Cir. 2016) (“While each trademark must always be evaluated individually, pluralization commonly does not alter the meaning of a mark.”); *In re Belgrade Shoe*, 411 F.2d 1352, 162 USPQ 227 (CCPA 1969); *Wilson*

v. Delaunay, 245 F.2d 877, 114 USPQ 339, 341 (CCPA 1957) (“It is evidence that there is not material difference, in a trademark sense, between the singular and plural forms of the word ‘Zombie’ and they will therefore be regarded here as the same.”); *Swiss Grill Ltd. v. Wolf Steel Ltd.*, 115 USPQ2d 2001, 2011 n.17 (TTAB 2015) (singular and plural of SWISS GRILL deemed “virtually identical”); *Weider Publ’ns, LLC v. D & D Beauty Care Co.*, 109 USPQ2d 1347, 1355 (TTAB 2014) (singular and plural forms of SHAPE considered essentially the same mark). As discussed below, the relevant purchasers are ordinary consumers and they are unlikely to notice this minor difference.

Thomas La Perle, Applicant’s Legal Department Senior Director, testified that Live Photo is the product of the Live Photos software.

The Live Photo is the product of the Live Photos software feature. So it’s really the actual - - it’s the photo motion memory that’s captured with Live Photos.⁴⁴

I do agree that the Live Photos feature produces what [Applicant] calls a Live Photo.⁴⁵

Subsequently, La Perle explained, “Live Photo” is “really a file name associated with the Live Photos software.”⁴⁶

⁴⁴ La Perle Cross-Examination Dep., pp. 14-15 (63 TTABVUE 18-19). *See also id.* at pp. 17 (63 TTABVUE 21).

⁴⁵ *Id.* at p. 21 (63 TTABVUE 25).

⁴⁶ *Id.* at p. 28 (63 TTABVUE 32).

There had to be a name for what the resulting product was from the Live Photos feature, and it makes sense, from a marketing perspective, to call it a Live Photo.⁴⁷

We find that the genus of the services at issue is “computer software for recording and displaying images, video and sound,” including the resulting images, video and sound produced by the software. Because the resulting images, video, and sound produced by the software are the purpose or key aspect of the software. *See Royal Crown*, 127 USPQ2d at 1046 (quoting *Cordua*, 118 USPQ2d at 1637 (“[A] term can be generic for a genus of goods or services if the relevant public ... understands the term to refer to a key aspect of that genus.”)). So, if the public understands “Live Photo(s)” when used in combination computer software for creating moving images or the moving images so created refer to type of software or the results of using the software, “Live Photo(s) is generic. *Royal Crown*, 127 USPQ2d at 1047.

B. Relevant Public

The second part of the *Marvin Ginn* test inquires whether the relevant public understands the term sought to be registered primarily to refer to that genus of goods? The relevant public is the purchasing public for the identified goods. *Sheetz of Del., Inc. v. Doctor’s Assocs. Inc.*, 108 USPQ2d 1341, 1351 (TTAB 2013); *see also Booking.com*, 2020 USPQ2d 10729, at *5 (“whether ‘Booking.com’ is generic turns on whether that term, taken as a whole, signifies to consumers the class of online hotel-reservation services”).

⁴⁷ *Id.* *See also id.* at p. 39 (63 TTABVUE 43 (Opposer considers “Live Photo” to be a trademark for a file format)).

Applicant's LIVE PHOTOS software is a camera feature included in its iPhone cellphones.⁴⁸ Because cellphones are ubiquitous in today's culture and marketplace, the relevant purchasers are ordinary consumers.

C. Evidence

We now review the evidence showing how the relevant public perceives "Live Photo(s)."

1. The Meaning of the Component Terms

The MERRIAM-WEBSTER DICTIONARY (merriam-webster.com) defines "live," *inter alia*, as "abounding with life: vivid," "being in a pure native state," and "being in play a live ball."⁴⁹ "Active" is a synonym for "live."⁵⁰

The MERRIAM-WEBSTER DICTIONARY (merriam-webster.com) defines "photograph" as "a picture or likeness obtained by photography."⁵¹ "Photo" is a synonym for "photograph."⁵²

⁴⁸ La Perle Testimony Decl. ¶10 (49 TTABVUE 4).

⁴⁹ 33 TTABVUE 7,

⁵⁰ 33 TTABVUE 8.

⁵¹ 33 TTABVUE 20. The MERRIAM-WEBSTER DICTIONARY (merriam-webster.com) defines "photography" as "the art or process of producing images by the action of radiant energy and especially light on a sensitive surface (such as film or an optical sensor)."

The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff'd*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016); *In re S. Malhotra & Co. AG*, 128 USPQ2d 1100, 1104 n.9 (TTAB 2018); *In re Red Bull GmbH*, 78 USPQ2d 1375, 1378 (TTAB 2006).

⁵² 33 TTABVUE 20.

There is no dictionary definition for the composite term “Live Photos.”⁵³ However, the Computer Desktop Encyclopedia (1981-2018) (encyclopedia2.thefreedictionary.com/Live+Photos) defines “Live Photos as follow:

An iPhone camera feature starting with the iPhone 6s that records three seconds of video (MOV) along with the still JPEG photo.⁵⁴

2. Applicant’s use of “Live Photos”

In addition to Applicant’s specimen of use submitted with its application, the evidence we list below shows how Applicant uses “Live Photos.”

- In Applicant’s published application No. US 2017/0109596 A1, entitled “Cross-Asset Media Analysis and Processing,” filed October 20, 2016 and published April 20, 2017 (subsequent to the filing date of Applicant’s application), Applicant explains

⁵³ Opposer’s Cross-Examination Dep. Exhibit 7 (48 TTABVUE 378-439).

⁵⁴ Opposer’s Cross-Examination Dep. Exhibit 8 (48 TTABVUE 440). *See also id.* Exhibit 9 (48 TTABVUE 441) based on the Computer Desktop Encyclopedia posted at (yourdictionary.com).

We do not consider Opposer’s Cross-Examination Dep. Exhibit 10 (48 TTABVUE 443-443) purportedly the results of Google search for “live photo” because Applicant did not include the url or the date accessed and Opposer could not authenticate it. Opposer’s Cross-Examination Dep., pp. 101-103 (48 TTABVUE 102-104). *See also* Trademark Rule 2.122(e)(2), 37 C.F.R. § 2.122(e)(2) (“Internet materials may be admitted into evidence under a notice of reliance in accordance with paragraph (g) of this section, in the same manner as a printed publication in general circulation, so long as the date the internet materials were accessed and their source (e.g., URL) are provided.”); *Safer, Inc. v. OMS Investments, Inc.*, 94 USPQ2d 1031, 1039 (TTAB 2010) (if a document obtained from the Internet identifies its date of publication or date that it was accessed and printed, and its source (e.g., the URL), it may be admitted into evidence pursuant to a notice of reliance in the same manner as a printed publication in general circulation in accordance with Trademark Rule 2.122(e).).

that the asset analyzer may store a variety of different types of assets, including “[s]tored ‘live photos,’ assets that have both still image portions and video portions.”⁵⁵


- An excerpt from Applicant’s website (support.apple.com).⁵⁶


Take and edit Live Photos

Capture photos that come alive when you touch them. Then you can pick a different key photo, add a fun effect, edit your Live Photo, and share with your family and friends. All from your iPhone 6s and later.

Take a Live Photo

Live Photos records what happens 1.5 seconds before and after you take a picture. What you get is more than a great photo: a moment captured with movement and sound. You take a Live Photo just like you do a traditional photo.

1. Open the Camera app.
2. Make sure that your Camera is [set to photo mode](#) and Live Photos is turned on.
3. Hold your iPhone still.
4. Tap .

Live Photos is on by default on your [iPhone 6s and later](#). If you want to [take a still image instead](#), tap  to turn off Live Photos. You can preserve your Camera settings so that Live Photos is always on or off. Go to [Settings > Camera > Preserve Settings](#).



- An excerpt from Opposer’s website advertising “Photos for macOS” (apple.com/macOS/photos/).⁵⁷

Bring even more life to your Live Photos. When you edit a Live Photo, the Loop effect can turn it into a continuous looping video that you can experience again and again. Try Bounce to play the action forward and backward. Or choose Long Exposure for a beautiful DSLR-like effect to blur water or extend light trails. You can also trim, mute, and select a key photo for each Live Photo.

⁵⁵ 34 TTABVUE 159 (Column 1 [0015]). See also 34 TTABVUE 160 (Column 2 [0023] and [0026] referring to “live photo” in a descriptive or generic manner).

⁵⁶ 52 TTABVUE 49. See also 34 TTABVUE 149-152.

⁵⁷ 52 TTABVUE 57.

• iPhone 6s – Technical Specifications webpage (support.apple.com) lists “Live Photos with stabilization” as a feature of the camera function.⁵⁸

Camera

- 12-megapixel camera
- Live Photos with stabilization
- Autofocus with Focus Pixels
- Optical image stabilization (iPhone 6s Plus only)
- True Tone flash
- Panorama (up to 63 megapixels)
- Auto HDR for photos
- Exposure control
- Burst mode
- Timer mode
- f/2.2 aperture
- Five-element lens

• Applicant’s website advertising the iOS 11 operating system for iPhones and iPads (apple.com/ios-11/).⁵⁹

⁵⁸ 52 TTABVUE 158. *See also* “iPhone 6s Plus – Technical Specifications” (52 TTABVUE 165) (same); “iPhone 7 – Technical Specifications” (52 TTABVUE 173) (same); “iPhone 7 Plus – Technical Specifications” (52 TTABVUE 180) (same); “iPhone 8 – Technical Specifications” (52 TTABVUE 187) (same); “iPhone 8 Plus – Technical Specifications” (52 TTABVUE 194) (same); “iPhone X – Technical Specifications” (52 TTABVUE 222) (same).

Applicant does not refer to LIVE PHOTOS in the “iPhone 11 – Technical Specifications” (52 TTABVUE 200-206), the “iPhone 11 Pro – Technical Specifications” (52 TTABVUE 201-213), the “iPhone 11 Pro Max – Technical Specifications” (52 TTABVUE 214-220), the “iPhone XR – Technical Specifications” (52 TTABVUE 228-234); the “iPhone XS – Technical Specifications” (52 TTABVUE 235-241); or the “iPhone XS Max – Technical Specifications” (52 TTABVUE 242-248).

⁵⁹ 52 TTABVUE 275-276.

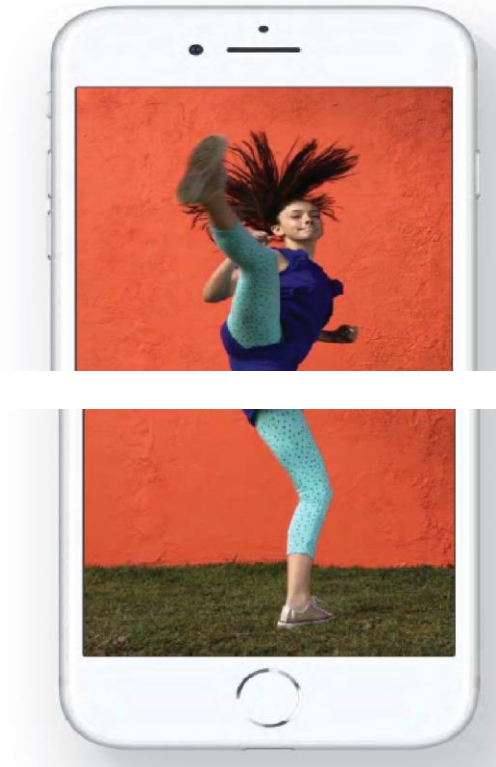
Live Photos. Livelier than ever.

Now your Live Photos can be even more expressive, creative, and just plain fun.

[Learn more about Photos >](#)

[Loop](#) [Bounce](#) [Long Exposure](#)

Turn a Live Photo you love into a fun video loop. Choose an image yourself, or let Photos suggest which ones would make great loops.



- Applicant's September 28, 2015 press release.

The new iPhones introduce Live Photos, which bring still images to life, transforming instants frozen in time into unforgettable living memories.⁶⁰

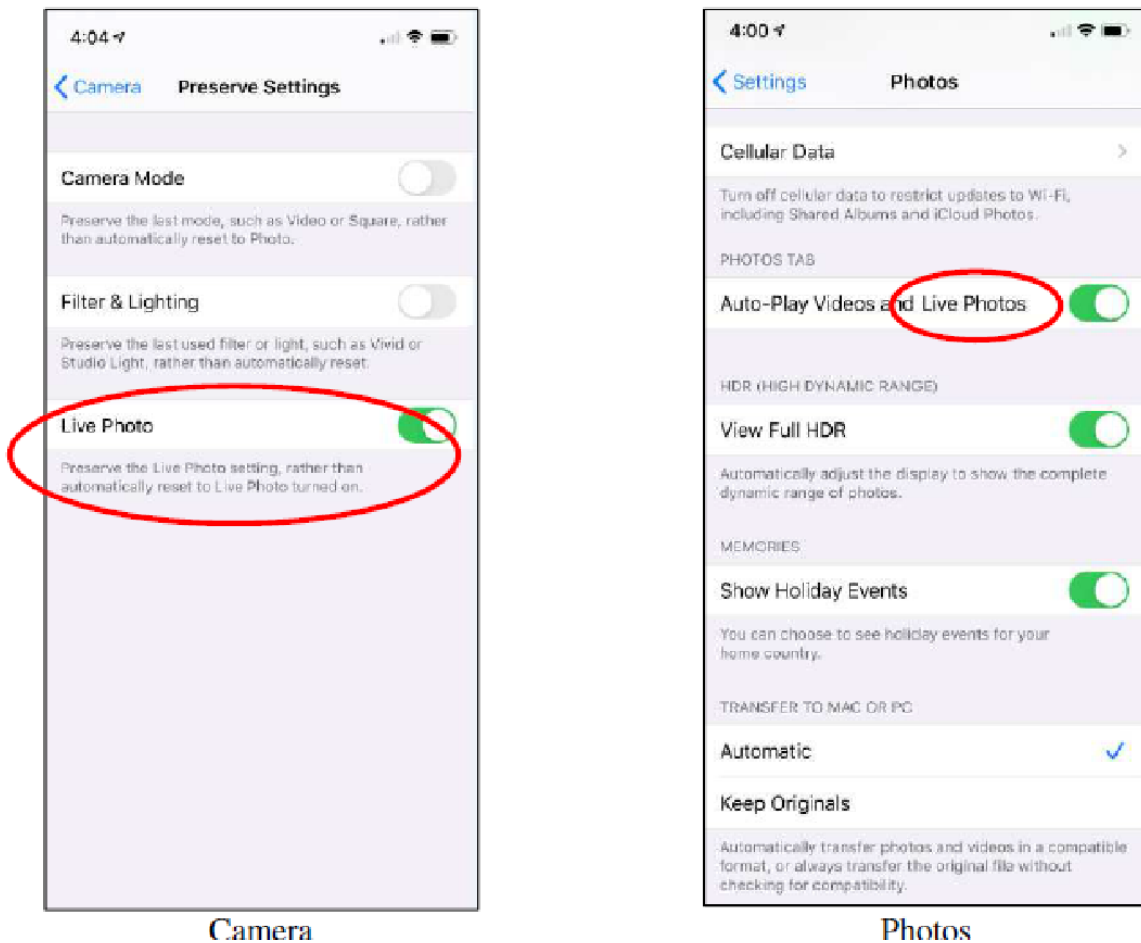
- "Live Photos Called 'Best New Feature,' Composed of Separate JPG and MOV Files," MacRumors Newsletter (macrumors.com) (September 22, 2015)

The iPhone 6 and 6s Plus include several new camera features that have been highly popular in reviews thus far; but there's also a fantastic update to the way photos are displayed in the two devices. With Live Photos, exclusive to the iPhone 6s and 6s Plus, a bit of motion is captured alongside each photo, enabling short animation that bring each image to life.⁶¹

⁶⁰ 52 TTABVUE 309.

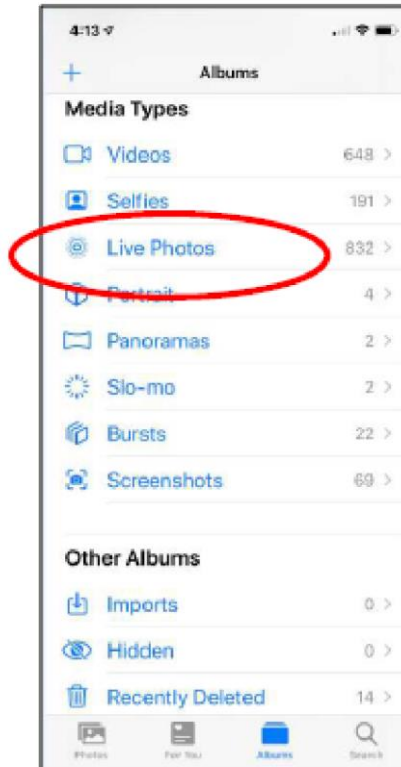
⁶¹ 53 TTABVUE 43.

• “Further, each consumer purchasing one of these devices is likely to be exposed to the LIVE PHOTOS brand name, as the name appears in multiple places when operating these devices. For example, on an iPhone X operating the iOS 13.4.1 operating system, the LIVE PHOTOS mark appears in “Settings” in both the “Photos” and “Camera” sections, as shown below:”⁶²



⁶² La Perle Testimony Decl. ¶43 (49 TTABVUE 19).

• “Live Photos” also appears in the Photos app under “Albums,” as reproduced below:⁶³



3. Third-party use of “Live Photos”

Opposer introduced Internet evidence displaying third-party writers and reviewers using “Live Photo” to refer to Applicant’s software and similar software.⁶⁴

We list below the Internet evidence introduced by Opposer:

⁶³ La Perle Testimony Decl. ¶44 (49 TTABVUE 19-20).

⁶⁴ We did not include the webpage from the Huffingtonpost.ca (35 TTABVUE 14) because .ca indicates a Canadian website and, thus, this website is directed to readers in Canada rather than the United States.

We did not include “What is Live Photo and do I use it on my LG G7? because it posted on lg.com.uk indicating that the website is directed to consumers in the United Kingdom rather than the United States.

We did not include “Google picks the best Android apps of 2018; The apps to download now,” in London Evening Standard (December 3, 2018) posted on advance.lexis.com (36 TTABVUE

- “How HTC Invented the ‘Living Photo,’” LinkedIn website (linkedin.com)

(September 29, 2015).

Earlier this month, Phil Schiller [Applicant’s] marketing chief, stood on stage and trumpeted a brand new feature in the iPhone 6s called “Live photos.”

“I found that Live Photos quickly became an enjoyable, integral part of shooting photos with an iPhone,” Brian X. Chen wrote in his *New York Times* review.

“The absolute best thing about the 6s is Live Photos. While capturing a still photo, it also captures a bit of live action. They’re awesome for reliving fun moments, especially of an active puppy or child,” said Joanna Stern in the *Wall Street Journal*.

John Packzowski of BuzzFeed raved: “If I were a new parent, I would upgrade to the 6s for the Live Photos alone. It’s a powerful feature, powerfully executed.

Here’s the thing, though. The Live Photo concept isn’t new. [Applicant] wasn’t the first to come up with the idea. They weren’t even the second.⁶⁵

123) because the London Evening Standard is obviously a London publication directed to readers in the United Kingdom.

We did not include “Intex Aqua Power With 4000mAh Battery, Octa-Cor SoC Launched at Rs. 8,444 posted at gadgets.ndtv.com (38 TTABVUE 11) because it is a press release regarding the launch of the product in India.

We did not include “Micromax Canvas Unite 2 Review: A good buy for Rs 6,999” posted at themobileindian.com (38 TTABVUE 14) because it is a product review directed to the market in India.

We did not include “Karbonn Titanium Octane Plus Review: Specifications Aren’t Everything,” posted on the Gadgets 360 website (gadgets.ndtv.com) (38 TTABVUE 37) because it is a product review directed to the market in India.

We did not include “Launch: Micromax Unite 2 has 21 Languages. Is it as good as Moto E?” The Indian Express posted at indianexpress.com (38 TTABVUE 48) because it is an article directed to the market in India.

⁶⁵ 34 TTABVUE 33.

So here's the real story of how HTC invented the "living photo."⁶⁶

- "Live Photos on Android Are Available in These Awesome Free Apps,"

PocketMeta website (pocketmeta.com) (March 26, 2016).⁶⁷

When the new iPhones 6S and 6S Plus started shipping with the 12-megapixel cameras and Live Photos, it was crystal clear the live shots are becoming the next big thing in the world of mobile cameras. ... Without further ado, here are some Android apps that offer live photos feature or similar, or even better.⁶⁸

Camera MX

... Give it a try, or read this detailed guide on how to take live photos with it.⁶⁹

Z Camera

I have no idea why the Z Camera does not put this feature in your face, but it has a dynamic photo feature, which is basically a live photo. In fact, Z Camera's dynamic photo is longer than iPhone's live photos, and it saves as mp4 file you can easily share with your desktop computer.⁷⁰

Fyuse – 3D Photos

⁶⁶ 34 TTABVUE 34.

⁶⁷ Opposer introduced a second copy of this website at 35 TTABVUE 54.

A similar but not identical article is posted on the Bee Bom website (beebom.com) (September 29, 2016) (34 TTABVUE 47-54 and 35 TTABVUE 45-52).

⁶⁸ 34 TTABVUE 38.

⁶⁹ 34 TTABVUE 39.

⁷⁰ 34 TTABVUE 40.

Fyuse is different, yet awesome. It lets you shoot live photos that include not only time, but also space.⁷¹

Phogy, 3D Camera

Phogy is similar to the above-mentioned Fyuse, in the way that it lets you create spatial 3D live photos, and perhaps it's one of the go-to apps if you are looking to replicate that coveted iOS functionality on your Android device. ... The free version has a 3-second limitation while the premium version removes that cap, adding unlimited captures, the option to create short mp4 videos, GIF images, set your live photos as your wallpapers, HD photos, exposure time and other goodies.⁷²

Live Photos Galore – Honorable mentions

Vine ...

Instagram ...

HTC Zoe ...

Google Camera ...

Samsung Stock Camera ...

What's your app of choice when it comes to creating live photos on Android?⁷³

- “Live Photos’ Feature on Android,” MakesUseOf website (makesuseof.com)

(February 16, 2016).⁷⁴

Photos don't move. That's what movies (short for “moving pictures”) do. But the popularity of GIF-style images,

⁷¹ 34 TTABVUE 41.

⁷² 34 TTABVUE 42.

⁷³ 34 TTABVUE 43-44.

⁷⁴ Opposer introduced a second copy of this website at 35 TTABVUE 112.

introduced by [Applicant] as “Live Photos” (although Cinemagraph feature on Windows Phone 8 predates this by two years) means that everyone seems to want an unnerving collection of Harry Potter-esque portraits on their phones.⁷⁵

Grahica Live Photo Maker

Perhaps the easiest to use, Graphica Live Photo Maker pretty much does what the name suggests, launching quickly with a menu offering the ability to take a Quick Live Photo, create animations from previous photos on your phone with Gallery Live Photo and also take a Live Photo with Frame.

For the Quick Live Photo, simply tap the button, line up the shot, and tap Start. As long as your subject is moving slightly, you should get good results. With the live photo captured, you can adjust the speed using the green slider, and when happy, tap.⁷⁶

Gif Me! Camera

... Creating a live photo from scratch is simple – just tap the Camera icon, and press the capture button until you’re done.⁷⁷

Camera MX

Another free, ad-supported option, Camera MX is capable of more than just live photos, and has a wide selection of options available in the Settings screen.⁷⁸

⁷⁵ 34 TTABVUE 56.

⁷⁶ 34 TTABVUE 57.

⁷⁷ 34 TTABVUE 58.

⁷⁸ 34 TTABVUE 59.

- “Google Clips review: AI is not ready to be your photographer,” Mashable website (mashable.com) (April 14, 2018).

By “moments,” I mean Clips captures “live” photos by default, 7-second videos similar to the one’s [Applicant’s] iPhones take. Google has done a decent job of making its Photos platform ... compatible with [Applicant’s] live pics.⁷⁹

- “The LG G6 features one of the best smartphone cameras,” Mobile Syrup website (mobilesyrup.com).

The various modes attached to the Auto mode include past staples like Popout, Panorama, and Time-lapse, and include others like Snap (LG’s live photo feature), 360 Panorama and Food.⁸⁰

- “How to get iPhone’s Live Photos on Android with Google Motion Stills (and other apps),” The Android Soul website (theandroidsoul.com).

[T]here are certain software features that [Applicant] reinvented before Android, and Live Photos is one of them.

If you don’t know what the Live Photos feature is, it’s a feature that loops together multiple photos creating GIF-style media. ... While Google has already brought this feature to the Pixel devices through Motion Shoot, the company has also created the Motion Stills app which brings Live Photos and much more to any Android device.

How to capture Live Photos on Android ...

Click Live Photos with Google Motion Stills app ...⁸¹

Alternative Android apps for Live Photos

⁷⁹ 34 TTABVUE 81.

⁸⁰ 34 TTABVUE 91.

⁸¹ 34 TTABVUE 104-105.

The brilliance of Google Play Store has allowed developers to introduce even more ways to bring Live Photos to Android and then some more. We've shortlisted some of the most innovative apps we could find for creating Live Photos on Android.⁸²

- "Exclusive: LG G7 ThinQ Feature Dual 16 MP Cameras, Selfie Portrait Mode, Oreo & More," Android Headlines website (androidheadlines.com) (April 10, 2018).

3D Camera stickers, Live Photo, Portrait Mode, and a new version of Graphy

If the typical intelligence features on offer with the cameras are not for you, then this is only the start of what the cameras offer, as the G7 is going to be packed to the brim with additional camera software tweaks. ... Adding to its feature-rich repertoire, "Live Photo" will be offered on the G7 so users can capture additional photos both before and after the main photo is captured. The result of which can then be viewed and/or shared as a short video, or just used as a means to select the 'best shot' from a variety of shots.⁸³

- "Here's Another Look At the LG G7 Thin Q," Android Headlines website (androidheadlines.com) (April 16, 2018).

The phone will continue the smartphone trend of dual rear-facing cameras as well, and offer features such as Portrait Mode, Live Photos, and 3D Stickers, all of which have been popular offerings on other smartphones from different brands.⁸⁴

- "ZTE Shakes Up the U.S. Smartphone Market with Axon 7 Arriving Stateside for \$399.98," Business Wire website (businesswire.com) (July 13, 2016).

⁸² 34 TTABVUE 109.

⁸³ 34 TTABVUE 129-130. Opposer introduced a second copy of this website at 35 TTABVUE 153 and a third time at 36 TTABVUE 12.

⁸⁴ 34 TTABVUE 138.

Beyond a Camera

The 20-megapixel rear camera is equipped with dual image stabilization to prevent blurred images when capturing real-life moments. Features such as Live Photo generate animated images that can be shared via text, email, and across social media.⁸⁵

- “Enhance your Live Photos & sort albums in new ways,” Google website (google.com).

Live Photos bring photos to life with sound and motion, but can suffer from the everyday bumps and shakes that happen when you take photos. Plus, they can be hard to share with friends who don’t have an iPhone.

Now, with the latest Google Photos update on iOS, you can make your Live Photos smoother and more shareable in just a tap.

Using advances stabilization and rendering originally used the Motion Stills app, Google Photos can freeze the background in your Live Photos or create sweeping cinematic pans, turning your Live Photos into beautiful, captivating moments. Easily save it as a looping video and share it with anyone.⁸⁶

- “Lumia Cinemagraph [sic] lets you capture live photo from Windows Phone,” The Windows Club website (thewindowsclub.com).

What is Lumia Cinemagraph

In simple words, Lumia Cinemagraph is actually a camera feature of Lumia mobiles. ...

Lumia Cinemagraph helps users to create a 5 seconds [sic] animated image. ...

⁸⁵ 34 TTABVUE 145-146.

⁸⁶ 35 TTABVUE 41.

Use Lumia Cinemagraph to capture live photo [sic].⁸⁷

- “Lytro discontinues ‘living pictures’ image hosting service,” Tech Spot website (techspot.com).

Lytro burst on the scene in mid-2011 with the introduction of a promising photography technology that allowed users to snap photos without having to first lock down the focus. By capturing the light field, users could manipulate photos after the fact and create “living pictures” that could be focused at will.⁸⁸

Had Lytro been able to somehow streamline its live photo technique, it could have drastically revolutionized photography.⁸⁹

- “Bring photos to life: How to get [Applicant’s] Live Photos on Android,” the Updato website (updato.com) (April 12, 2016).

Android fanboy, there is no comparison between Android and iOS when it comes to functionality. However, even the strongest of [Applicant’s] critics admit to how well the brand can reinvent things, just as they have done with Live Photos. However, getting Live Photos on Android [is] not an impossible feat.

In fact, Live Photos are basically high quality .GIF files that give you a short soundless video.⁹⁰

- “How To Get iPhone’s Live Photos Feature on Android,” BeeBom website (beebom.com) (September 29, 2016).

⁸⁷ 35 TTABVUE 62-63.

⁸⁸ 35 TTABVUE 71.

⁸⁹ 35 TTABVUE 72.

⁹⁰ 35 TTABVUE 80.

[Applicant] introduced a new feature with the new iPhone 6s and 6s Plus this year dubbed “Live Photos”, which are basically GIF images with sound. ...

We are pretty sure we will see an implementation of Live Photos on all Android devices soon but till then, you can make do with these apps that let you capture Live Photos with ease. As we mentioned, Live Photos are nothing but GIF images with audio, so we are including apps that let you create GIF images with audio. So, here’s how you can get Live Photos on Android:

Apps that bring Live Photos feature on Android ...⁹¹

- “Still Missing Live Photos on Your Android? Try These 3 Apps,” Gadget Hacks

website (android.gadgethacks.com) (January 16, 2018).

[Applicant] didn’t invent the concept of photos with videos embedded (that credit goes to HTC and their Zoe feature), but they sure did popularize this functionality when they came out with Live Photos. If you’re jealous of iPhone users, you certainly don’t need to be – there are several ways to recreate Live Photos on Android.⁹²

- “Zoe (live) Photos?” posted on the Android Central website

(forums.androidcentral.com).

returnmyjedi

I’ve been enjoying my Red U11 for a few days now (especially the superb music playback and speediness it exhibits compared to the S7 Edge it replaced) but I’m missing the live photos. My wife had an M7 which had HTC’s Zone photos, but I can’t find the option on the U11.⁹³

⁹¹ 35 TTABVUE 102.

⁹² 35 TTABVUE 140.

⁹³ 35 TTABVUE 148.

- “Live Photo,” on the Android Central website (forums.androidcentral.com).

heavyvino

What is the easiest way to get a single photo out of a live photo series?

bbgsuser

By “live photo” do you mean the burst you get when you hold down the shutter button?⁹⁴

- A series of cellphone reviews posted on the Android Headlines website (androidheadlines.com) referring to the term “Live Photos.”⁹⁵ The following sentence is representative: “Some of the modes include live photo, motion track photo, Face Beauty, Panorama and others.”⁹⁶

- “Missing live photos on your phone? Go With This Live Photos Android Guide!” on the Android Portal website (theandroidportal.com).

Live photos are really great. However, this feature is limited to only a few smartphone brands and models. ...

In today’s new generation era, live photos are more in trend. Everyone wants live photos feature in their android phones but not all android users can enjoy this feature in their phones. Well, you can always enhance the photography of your smartphone through camera settings. The basic concept of live images is to take still pictures and quick videos simultaneously which enhance the beauty and quality of your photos.

There are many different ways to achieve this functionality in your android device. In some android device[s] like [Applicant’s] iPhone, HTC, etc. this feature is built by

⁹⁴ 35 TTABVUE 97.

⁹⁵ 35 TTABVUE 164-281 and 36 TTABVUE 28-53.

⁹⁶ 35 TTABVUE 185. *See also* 35 TTABVUE 214, 241, and 273 and 36 TTABVUE 45.

default. What happens to the others with a smartphone not supporting live photos Android feature by default?

There are a couple of great camera apps you can have on your phone for better photography. However, here are the best three apps popular for Live photos.

3 Best Apps With Live Photos Android Functionality⁹⁷

From the all above options which one do you prefer? Well, I would suggest you [sic] that Motion Stills app, that's one of the best apps among all. I feel it's a perfect substitute for live photos even if it doesn't capture a still image too.⁹⁸

- “LG V40 ThinQ Picks Up Five Cameras; You Can Pick up Preorder Goodies from US Cellular,” on the Gear Diary website (geardiary.com) (October 4, 2018).

[Y]ou can create funky live photos as well, giving you lots of ways to make your Instagram really pop.⁹⁹

- “Apps for Creating Living Photos,” on the Push Interactions website (pushinteractions.com).¹⁰⁰

- “The History of Cinemagraphs Includes David Bowie,” on the Flixel website (blog.flixel.com).

Cinemagraphs vs. Live Photos

Secondly – and this one draws the ire of the Internet's impassioned cinemagraph community – I would be remiss to not bring up another variation of image capture: iOS Live Photos feature, which is available on all new iPhone models. When you take a picture through the Live Photo

⁹⁷ 37 TTABVUE 12.

⁹⁸ 37 TTABVUE 15.

⁹⁹ 36 TTABVUE 21.

¹⁰⁰ 36 TTABVUE 56.

option, prior to the snap flash, the camera records approx.
1.5 second of video.¹⁰¹

- “HTC Desire 616 dual sim (Live photo demo) on YouTube (YouTube.com).¹⁰²
- “How to Make Normal Photo to Live Photo [Live Effect] PixaLoop,” on YouTube (YouTube.com) (July 3, 2019).¹⁰³
- “mobile camera – live photo mode,” on YouTube (YouTube.com) (November 17, 2014).

this video shows you that what the effect has been occurred
[sic] in live photo mode. ...

this features in Samsung models, micromax models, lava
models, sony, Motorola ... etc.

- “How to backup live photos from the G7,” on the XDA Developers website (forum.xda-developers.com) (September 27, 2018).

I decided to try out the live photos function in the camera
app as it could be fun to have some short video clips when
taking pictures of our dog etc¹⁰⁴

- “P9 Lite – Live Photos?” on the XDA Developers website (forum.xda-developers.com) (October 16, 2017).

Hello folks,

Does somebody know if Live Photos (like Samsung S7.8
and iPhone Camera) feature is available of P9 Lite?¹⁰⁵

¹⁰¹ 36 TTABVUE 83.

¹⁰² 36 TTABVUE 88.

¹⁰³ 37 TTABVUE 6.

¹⁰⁴ 36 TTABVUE 98-99.

¹⁰⁵ 36 TTABVUE 107.

- “Live Photos,” on the Android Forums website (androidforums.com).

I’ve released an app that allows you to view your photos (or any folder containing images) on your wallpaper [illegible] ... It’s fully configurable, so you can set it up just the way you want it. e.g. You can set the transition times, delay [illegible]. Just search for “Live Photos” on the android market to check it out.

It’s presently on sale at [illegible].¹⁰⁶

- 12 news articles referring to the term “Live Photo(s)” posted on advance.lexis.com.¹⁰⁷ We have listed below three representative news article:

(1) “10 Best Android Fun Apps for Phones and Tablets,” Mobile Phone Advisor (December 2, 2013).

You only have to point your Android cam and see LIVE Photo impacts on the screen PRIOR TO you click the button on your camera for taking the breeze and examine the comical outcomes by yourself.¹⁰⁸

(2) “ET review: InFocus M680,” The Economic Times (December 17, 2015).

The [Android] camera app offers modes like live photo, motion track, panorama, multi angle and face beauty. While there is no manual mode, you can still adjust exposure, while balance and ISO in the settings before taking a photo.¹⁰⁹

(3) “Intex Launch 4.5-Inch Aqua Speed With A Focus On Photography And Performance,” Android Headlines (March 4, 2015).

It appears that the device focus will be photography as Intex have included several camera enhancement

¹⁰⁶ 36 TTABVUE 103.

¹⁰⁷ 36 TTABVUE 112-156.

¹⁰⁸ 36 TTABVUE 112. *See also* “Camera Fun Pro 4.0 for Android,” Mobile Phone Advisor (September 1, 2012) posted on advance.lexis.com (36 TTABVUE 116) (similar statement).

¹⁰⁹ 36 TTABVUE 120.

technologies including Panorama, Live Photo and Gesture capture modes.¹¹⁰

- “Live photo from samsung nor works,” on the Google website (support.google.com).¹¹¹
- A tablet review posted on the Laptop Magazine website (laptopmag.com).

Cameras ...

Click to Enlarge Camera options include normal and beauty modes, live photo, panorama and multi view.¹¹²

- The Prestigio tablet user manual (prestigio.com) refers to the camera featuring “Live photo mode – Take a live photo.”¹¹³
- “Review: The Cubot S168 Is The \$90 Phone You Had Been Waiting For,” Giz China website (gizchina.com).

Features like panorama, HDR, beauty shot (it has two of these for some reason, with one letting you control the amount of added fake beauty you wish to add) and live photo mode are supported by the S168, good enough to keep you interested in the camera for a while.¹¹⁴

- “Symphony Xplorer W75 Features and Specifications” DSpecs website (dspecs.com) (September 2014) identifies the following camera features:

Fixed focus, LED flash, Panorama, Face beauty, Live photo mode.¹¹⁵

¹¹⁰ 36 TTABVUE 129.

¹¹¹ 37 TTABVUE 10.

¹¹² 38 TTABVUE 33.

¹¹³ 38 TTABVUE 63.

¹¹⁴ 38 TTABVUE 83.

¹¹⁵ 38 TTABVUE 94.

We list below copies of webpages Opposer introduced from the Google Play website (play.google.com/store/apps/) advertising the sale of apps using the term “Live Photo(s).”

- “Camera MX – Free Photo & Video Camera” app.

Live Photos for Android

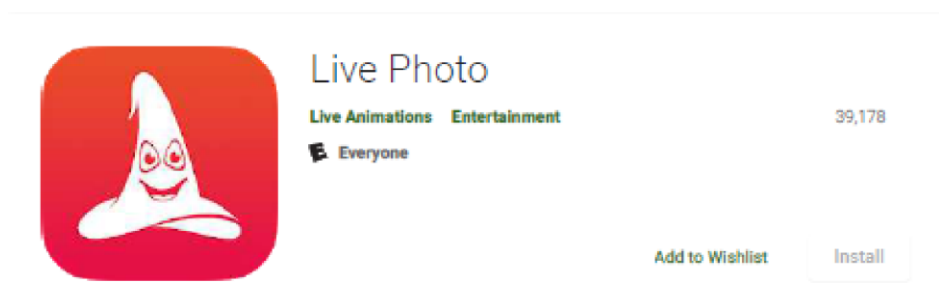
Take moving Live Photos that can come alive when touched – with “Live Shot”.

No longer decide whether to take a high-res photo or a video. With “Live Shot” you got both!¹¹⁶

- Live Motion Picture – Live Photo & Video Animation app.

Live Motion Picture – Live Photo & Video Animation is one of the smart way[s] to change your simple image into an amazing live motion picture with editing many more tools and you can also save this creation into application personal gallery “My Creation” and share on social side with simple click on your mobile screen.¹¹⁷

- Live Photo app.



Get ready for magic!

With this application you will be able to breathe life into the characters depicted on special notebooks, albums, notepads, puzzles etc. If you see the “Live Photo” logo of a

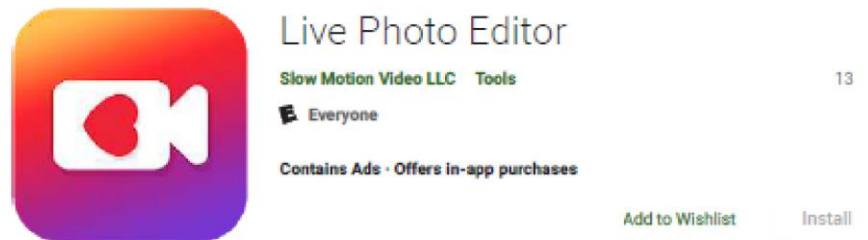
¹¹⁶ 34 TTABVUE 100.

¹¹⁷ 34 TTABVUE 168.

red smiling hat on the product cover, it means its magical and characters on it come to life!

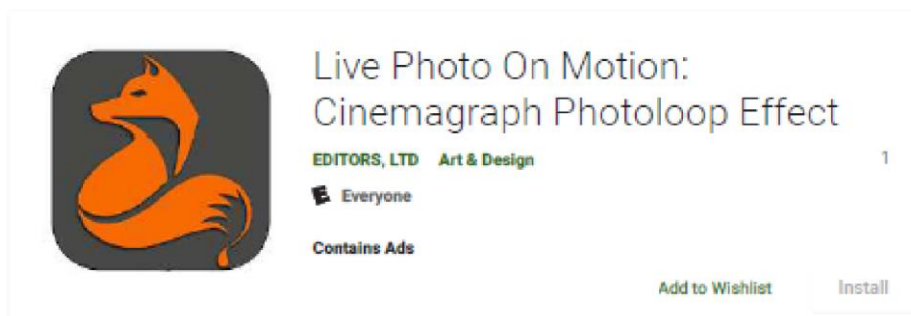
You don't have any products with the "Live Photo" logo? Don't get upset! Open the application and push the gift button have a set of magical pictures sent to your email. Animate them from your computer, print them out or share them with friends. It is free!¹¹⁸

- Live Photo Editor app.



Live Photo Editor is cinemagraph maker creating app that lets you add moving effects and elements to your photos, and make moving pictures. Live Photo Maker is Photomotion creating Living Photos, Moving Image, Photograph like Lumer moving photo motion Effects.¹¹⁹

- Live Photo on Motion app.



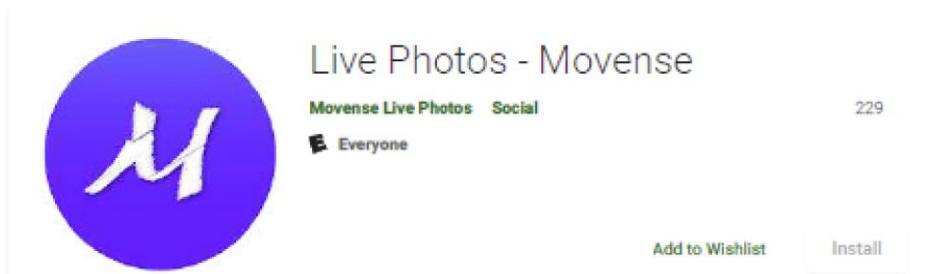
Live Photo on Motion: Cinemagraph Animation Effects is one of the smart way[s] to change your simple image into

¹¹⁸ 34 TTABVUE 172. *See also* liveanimations.org/en/marketing at 38 TTABVUE 7 stating "Live Photo has been downloaded by over 1,000,000 children around the world," with a photograph of a little girl holding the logo of the smiling hat.

¹¹⁹ 34 TTABVUE 176. Applicant introduced a webpage showing that the third party no longer posts this webpage. 53 TTABVUE 3.

amazing live motion picture[s] with editing many more tools and you can also save this creation into application personal gallery “My Creation” and share on social media.¹²⁰

- Live Photo - Movense app.



Movense is a Live photos capturing and motion photography based social network for users to express and share their life events (parties) surroundings (travel, animals, nature, food and fashion) and emotions (selfies) in 3D motion and then reverser playback on simple flip of your wrist.

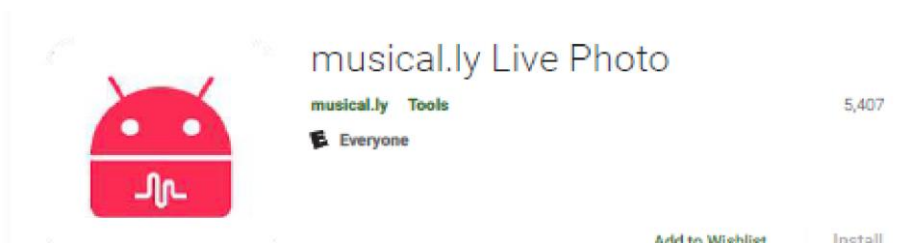
We call these Live Photo as Moves. MOVEs are motion sensible pictures that allows you to sense motion on flip and touch swipe gestures.

Recording a Move (Live Photos) is as simple as you snap pics or record a video.¹²¹

¹²⁰ 34 TTABVUE 181. Applicant introduced a webpage showing that the third party no longer posts this webpage 53 TTABVUE 4.

¹²¹ 34 TTABVUE 184. Applicant introduced a webpage showing that the third party no longer posts this webpage. 53 TTABVUE 5.

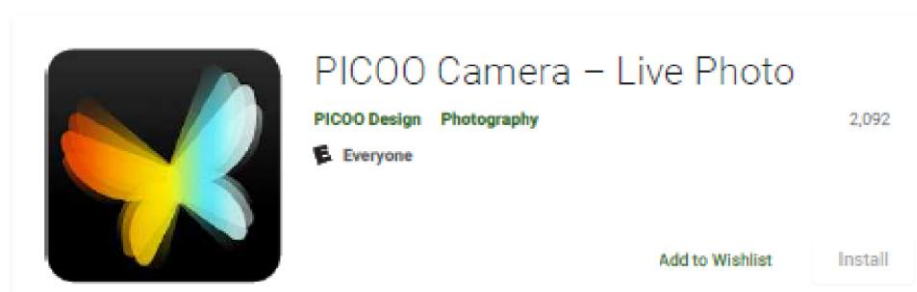
- musical.ly Live Photo app.



musical.ly Live Photo – help you convert videos on musical.ly to your wallpaper!

Install the musical.ly Live Photo according to the notice, after you finish installation, go back to musical.ly and you can convert videos to Live Photo!¹²²

- PICOO Camera – Live Photo app.

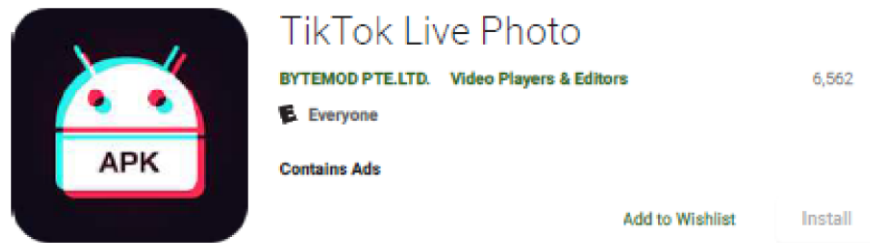


Tired of vapid still photos or robot-like GIFs and which to have a “Living” photos in which the view or people actually moves? Then PICOO Camera is your choice.¹²³

¹²² 34 TTABVUE 189. Applicant introduced a webpage showing that the third party no longer posts this webpage. 53 TTABVUE 6.

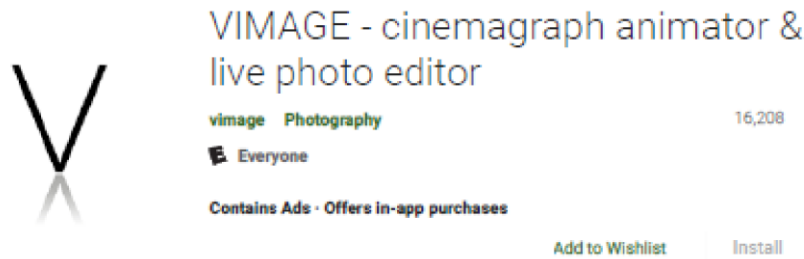
¹²³ 34 TTABVUE 193. Applicant introduced a webpage showing that the third party no longer posts this webpage. 53 TTABVUE 9.

- TikTok Live Photo app.



TikTok Live Photo – help you convert on TikTok to your wallpaper!¹²⁴

- VIMAGE app.



VIMAGE is a cinemagraph creating app that lets you add moving effects and elements to your photos, turning them into live pieces of art.¹²⁵

¹²⁴ 34 TTABVUE 197. Opposer introduced a second copy of this advertisement at 36 TTABVUE 188.

Applicant introduced a webpage showing that the third party no longer posts this webpage. 53 TTABVUE 10.

While the webpage has changed, Opposer introduced a copy of the Tik Tok Wall Picture app advertising “Save VIDEO as **LIVE PHOTO**” and “Choose one **LIVE PHOTO** from the album.” 68 TTABVUE 6. A person providing a feedback comment complains that the app will not let you “change your home screen or background screen into the live photo.” 68 TTABVUE 7. In addition, Opposer introduced a webpage from Yahoo! Style (ca.style.yahoo.com) explaining how to save and transfer a TIK TOK video into a “live photo.” 68 TTABVUE 11. *See also* 68 TTABVUE 17-21 (how to set a live photo as the lockscreen through the TikTok app).

¹²⁵ 34 TTABVUE 201.

- PixaMotion Loop Photo Animator & Photo Video Maker app.

Make live photos, live wallpapers, moving Backgrounds & themes with animation effects using PixaMotion photo animator.¹²⁶

- Autumn Leaves Wallpaper app.

You might want to take a photo of your friends or family and make it live wallpaper? Why not? Create you live photo wallpaper with effects!¹²⁷

Finally, developers for VUO – Cinemagraph, Live Photo & Photo in Motion app¹²⁸ and Live Photo LWP app¹²⁹ advertise the sale their apps on the APK Pure website (apkpure.com). The Live Photo LWP advertisement states “Say goodbye to static photo and say Hi to Live Photo.”

In opposition to Opposer’s evidence of third-party use of the term “Live Photos” as a purportedly generic germ, Applicant introduced evidence of third-party use that Applicant contends show “Live Photos” as a trademark for its software and the resulting moving photographs resulting the use of the software.¹³⁰ We list below representative examples of Applicant’s third-party evidence:

- “[Applicant’s] new Live Photos feature turns your pictures into videos,” The Verge (theverge.com) website (September 9, 2015).

¹²⁶ 37 TTABVUE 17.

¹²⁷ 38 TTABVUE 117.

¹²⁸ 37 TTABVUE 22.

¹²⁹ 38 TTABVUE 97.

¹³⁰ 53 TTABVUE 33-242. The evidence introduced by Applicant is not qualitatively different than the evidence introduced by Opposer in that both sets of third-party use show a mixed use of the term “Live Photo(s).”

Phil Schiller announced a few new iPhone camera tricks at today's Apple event, but one of the strangest was something called "Live Photos." Think of it as a something between automatic GIFs and short video clips.

Every picture you take with the new iPhone 6 or 6S Plus is, by default, also a Live Photo. ...¹³¹

- "How One Small Change To Apple iPhone 6 Revolutionizes Photography,"

Forbes (forbes.com) (September 15, 2015).

... I think that's exactly what [Applicant] has done with the camera feature on the iPhone 6s, more specifically something it has branded Live Photos.¹³²

—

Without doing anything different than you'd ordinarily do, Live Photos extends the moment of the capture by combining the best of still photography and video.¹³³

- "iOS 11 livens up Live Photos with some new tricks," CNET website (cnet.com)

(September 14, 2017).

When [Applicant] first launched its Live Photos feature, it was a fun addition to iOS. The feature turns ordinary photos into short videos, complete with sound and motion.

Starting with iOS 11, [Applicant] is adding some much-needed capabilities to the Live Photos feature.¹³⁴

- "iPhone SE: A Powerful New Smartphone in a Popular Design," Business Wire

website (businesswire.com) (April 15, 2020).

iPhone SE uses Haptic Touch for Quick Actions — such as animating Live Photos™, previewing messages,

¹³¹ 53 TTABVUE 34.

¹³² 53 TTABVUE 40.

¹³³ 53 TTABVUE 41.

¹³⁴ 53 TTABVUE 64.

rearranging apps and more — as well as contextual menus.¹³⁵

- “Why now is the time for [Applicant] to bring Android-like features to iPhones,”

Tech Radar website (techradar.com) (June 23, 2020).

[Applicant’s] Live Photos feature, when launched in 2015, felt very similar to the HTC Zoe functionality that never took off on the handsets like the HTC One MB. But, rather than being a complicated separate app, Live Photos still exist prominently within the camera app, and are a nice touch that users seem to appreciate.¹³⁶

- “About Those Wireless Headphones, and Other Apple Accessories, The New

York Times (September 15, 2016).

Far from the measly fixed-focus, two-megapixel camera in 2007’s original iPhone, the iPhone 6 line of 2014 had an eight-megapixel camera with a five-element lens, f/2.2 aperture, a True Tone Flash, face detection and other advanced features; the larger 6 Plus also provided optical image stabilization. The iPhone 6s series bumped up the camera resolution to 12 megapixels and added the animated Live Photos feature and 4K video support – but kept the five-element lens and f/2.2 aperture, while optical image stabilization stayed exclusive to the Plus-size version.¹³⁷

- “Finding the Perfect Part of a Live Photo,” The New York Times (January 9,

2018).

Q. How can I retrieve a still photo from the 1.5 seconds of an iPhone Live Photo before or after the official picture?

¹³⁵ 53 TTABVUE 108.

¹³⁶ 53 TTABVUE 115.

¹³⁷ 53 TTABVUE 213.

A. Live Photos – [Applicant’s] format that captures a bit of the subjects movement right before and after the “official” picture – can be edited. ...

Open the Photos app on the iPhone and find the image you want to edit. Live Photos are also collected in their own Live Photos album on the app’s Albums tab. After you open the file, tap the Edit button in the upper-right hand corner of the screen. The picture opens in the Edit mode, where the familiar tools for cropping and enhancing the photo are available.¹³⁸

4. Third-party use of “Living Photos”

- “Taking Photos with HTC Zoe,” posted at blog.htc.com on March 25, 2013.

Life rarely happens one frame at a time, which is why HTC developed our new UltraPixel camera with HTC Zoe. With HTC Zoe, on the new HTC One, a simple click of the shutter button captures up to 20 photos and a 3-second video image, including the last second of images before you tapped the picture button. ... HTC Zoe turns your smartphone into a **living photo** gallery of memories and interests.¹³⁹ (Emphasis added).

- “HTC One Review,” Photography Blog (photographyblog.com) (June 13, 2013).

HTC One is an Android smartphone with a 4-megapixel camera and a 28mm equivalent lens with a fast maximum aperture of f/2 and optical image stabilizer. ... The HTC One also offers ... the innovative Zoe shooting mode, which takes up to 20 shots and a 3 second video to create a “**living photo**” that you can share with friends and family.¹⁴⁰ (Emphasis added).

¹³⁸ 53 TTABVUE 242.

¹³⁹ 34 TTABVUE 9. Opposer introduced as second copy of this website at 35 TTABVUE 132.

¹⁴⁰ 34 TTABVUE 15. *See also* “Break the Mold: The New HTC One from AT&T Brings Your Mobile World to Life,” AT&T website (att.com) (February 19, 2013) (referring to “Living Photo Gallery”) (34 TTABVUE 20); “Hands-On With Sleek and Stunning HTC One,” Popular Mechanics (popularmechanics.com) (April 8, 2013) (34 TTABVUE 26) (referring to “living’ photos that move like the shots in a Harry Potter newspaper.”).

- “Create Living Photos with PanoMoments,” Panomoments.com.

A New Kind of Photo Format

Bring moments and places to life with a new web-based living photo format that allows you tell a visual story through an association of space and time. ... Simply upload either a standard of 360 video, and you'll have a living photo that can be shred anywhere on the web.¹⁴¹

- “Everything you need to know about Living Images, Rich Capture and more on your Lumia,” Windows website (blogs.windows.com).

Pioneered by Lumia, living images are magical photos that extend the image with a bit of video.¹⁴²

- “Video of Living Images up-close on the Nokia Lumia 930,” Phone Arena website (phonearena.com) (April 3, 2014).

Living Images is a pretty cool feature that basically incorporates small capsules of video just before or after a still picture, then mixing some of that action with the still image that was captured at the point of the shutter click.¹⁴³

- “Cinemagraphs: An Introduction To Living Photos,” ISO website (iso.500px.com).

First, there were photographs. Then, there came videos. Next up: cinemagraphs, and exciting new medium that pulls the best elements of its predecessors to advance visual storytelling in one vivid, eye-catching package. Think of them as living photos, composed like a photograph, that contain a hint of repeating, video motion.¹⁴⁴

¹⁴¹ 35 TTABVUE 8-9.

¹⁴² 35 TTABVUE 22.

¹⁴³ 35 TTABVUE 76.

¹⁴⁴ 35 TTABVUE 89.

- “Living Photos: Fstoppers Reviews Flixel Cinemagraph Pro for Mac,” on the Fstoppers website (fstoppers.com) (April 3, 2014).¹⁴⁵

- “Cinemagraphs vs. Still Photos in Social Advertising: Microsoft Case Study,” on the Flixel website (blog.flixel.com).

We’ve all seen our fair share of Facebook ads and promoted posts on Twitter that use still photos to attract the attention of their audience. But what happens when you switch the still for a living photo that share a unique story and holds their attention?¹⁴⁶

- “Flixel Living Photos,” on YouTube (YouTube.com) (February 2, 2016).¹⁴⁷
- “Flixel Relaunches Living Photos App, Brings Professional Quality Cinemagraphs to iPhone Users,” on the Betakit website (betakit.com) (July 19, 2013).¹⁴⁸

Flixel Living Photos

Apple iStore #1 Photography App creates Living Photos.¹⁴⁹

- “Cliplets Lets You Make Your Own Moving ‘Harry Potter’ Photos,” on the Mashable website (mashable.com) (April 18, 2012).

Built in Microsoft’s Research Labs, Cliplets is actually a freely downloadable Windows 7 app that lets you take a 10-second video clip and then manipulate it so portions of it run (usually in a loop) while the rest remains static. The effect is often called a “cinema graph” and essentially creates something akin to the living photos J.K. Rowling

¹⁴⁵ 36 TTABVUE 59.

¹⁴⁶ 36 TTABVUE 61.

¹⁴⁷ 36 TTABVUE 63. *See also* the Flixel app commercial “Flixel Living Photos” on YouTube (YouTube.com) (March 19, 2012) (36 TTABVUE 70-77).

¹⁴⁸ 36 TTABVUE 67.

¹⁴⁹ 36 TTABVUE 67.

introduced with her Harry Potter book series and then filmmakers illustrated throughout all eight of the Harry Potter films.¹⁵⁰

- “Living Photo for Webs Design,” on YouTube (YouTube.com).¹⁵¹
- “Women with glasses – living photo” on YouTube (YouTube.com).¹⁵²
- Three advertisements for apps using the term “Living Photos” on the Google

Play website (google.com/store/apps/).¹⁵³

D. Analysis

As noted above, LIVE PHOTOS is generic if the people who use or take licenses to use “computer software for recording and displaying images, video and sound” and the resulting simulated moving photographs perceive the term “Live Photo(s),” as a whole, as signifying the class of goods identifying the specific software and resulting product.

“An inquiry into the public’s understanding of a mark requires consideration of the mark as a whole. Even if each of the constituent words in a combination mark is generic, the combination is not generic unless the entire formulation does not add any meaning to the otherwise generic mark.” In re Steelbuilding.com, 415 F.3d 1293, 1297 [75 USPQ2d 1420, 1421] (Fed. Cir. 2005); see In re Am. Fertility Soc’y, 188 F.3d 1341, 1347 [51 USPQ2d 1832, 1837] (Fed. Cir. 1999) (“[I]f the compound word would plainly have no different meaning from its constituent words, and dictionaries, or other evidentiary sources, establish the meaning of those words to be generic, then the compound word too has been proved generic. No additional proof of the genericness of the compound word

¹⁵⁰ 36 TTABVUE 91.

¹⁵¹ 36 TTABVUE 94.

¹⁵² 36 TTABVUE 96.

¹⁵³ 36 TTABVUE 178-186.

is required.”).

In re 1800Mattress.com IP LLC, 586 F.3d 1359, 92 USPQ2d 1682, 1684 (Fed. Cir. 2009); *see also Booking.com*, 2020 USPQ2d 10729, at *2 (“A term styled ‘generic.com’ is a generic name for a class of goods or services only if the term has that meaning to consumers.”).

Applicant argues that the Internet documents Opposer introduced are hearsay and, therefore, Opposer may not rely on them for the truth of what the authors write or display in the documents.¹⁵⁴ Applicant is correct and we do not rely on the Internet documents or other evidence from printed publications for the truth of the matter asserted therein. The probative value of these documents lay in the fact that we may infer consumer perception through what the author wrote and, presumably, what the readers read. *See Spiritline Cruises LLC v. Tour Management Services, Inc.*, 2020 USPQ2d 48324, at *2, *11 (TTAB 2020) (“[S]uch materials are frequently competent to show, on their face, matters relevant to trademark claims (such as public perception), regardless of whether the statements are true or false”; third-party documentary evidence corroborates pervasive use by others in the industry) (quoting *Harry Winston S.A. v. Bruce Winston Gem Corp.*, 111 USPQ2d 1419, 1428 (TTAB 2014)); *Ricardo Media Inc. v. Inventive Software, LLC*, 2019 USPQ2d 311355, at *2 (TTAB 2019) (“sometimes what Internet printouts and printed publications show on their face is relevant to trademark cases, including likelihood of confusion cases”); *Robinson v. Hot Grabba Leaf, LLC*, 2019 USPQ2d 149089, at *6, *7 (TTAB

¹⁵⁴ Applicant’s Brief, pp. 35-36 (74 TTABVUE 37-38).

2019) (third-party references are probative evidence that the relevant public perceives the terms “grabba” and “grabba leaf” to, at a minimum, immediately convey information about an ingredient or characteristic of tobacco, or tobacco products, including cigar wraps; urban dictionary definition probative when considered in context of third-party use), *cancellation order vacated on default judgment*, No. 0:19-cv-61614-DPG (S.D. Fla. Dec. 17, 2019).

Applicant argues that Opposer’s evidence has little probative value because Opposer has not introduced evidence regarding viewership or circulation, *citing Baroness Small Estates, Inc. v. Am. Wine Trade, Inc.*, 104 USPQ2d 1224, 1228 (TTAB 2012) (evidence of five different wineries using the term at issue of which four have ceased such use lacks probative value where there is no evidence regarding the extent of public exposure); *In re Country Music Ass’n, Inc.*, 100 USPQ2d 1824, 1830 (TTAB 2011) (the relative obscurity of the third-party uses raises doubts about whether the relevant public will perceive the phrase as generic); *Zimmerman*, 70 USPQ2d at 1435 (use of term in a legal opinion has little probative value in determining public perception “given their limited circulation among members of the public.”).¹⁵⁵

While we keep the lack of specific proof of viewership and circulation in mind, “the magnitude of [the] evidentiary record is such that even allowing for these possibilities [some of the entities are out of business, are small enterprises, are in remote locations, or have reached only a miniscule portion of the relevant public], there is still a significant body of evidence of third-party use.” *In re Broadway Chicken Inc.*,

¹⁵⁵ Applicant’s Brief, p. 36 (74 TTAB VUE 38).

38 USPQ2d 1559, 1565 n.16 (TTAB 1996). The third-party evidence is sufficient to show a reasonable degree of public exposure to this type of Internet evidence . *Rocket Trademarks Pty Ltd., v. Phard S.p.A.*, 98 USPQ 2d 1066, 1072 (TTAB 2011).

In this regard, the Federal Circuit, in the context of determining priority, has explained that we must consider the evidence as a whole and that we should not specifically focus on each individual piece of evidence on a stand-alone basis to the exclusion of what the entirety of the evidence shows.

The TTAB concluded that each piece of evidence individually failed to establish prior use. However, whether a particular piece of evidence by itself establishes prior use is not necessarily dispositive as to whether a party has established prior use by a preponderance. Rather, one should look at the evidence as a whole, as if each piece of evidence were part of a puzzle which, when fitted together, establishes prior use. The TTAB failed to appreciate this. Instead, the TTAB dissected the evidence to the point that it refused to recognize, or at least it overlooked, the clear interrelationships existing between the several pieces of evidence submitted. When each piece of evidence is considered in light of the rest of the evidence, rather than individually, the evidence as a whole establishes by a preponderance that West used the “FAST EDDIE’S” mark prior to Jet’s admitted first use of the mark.

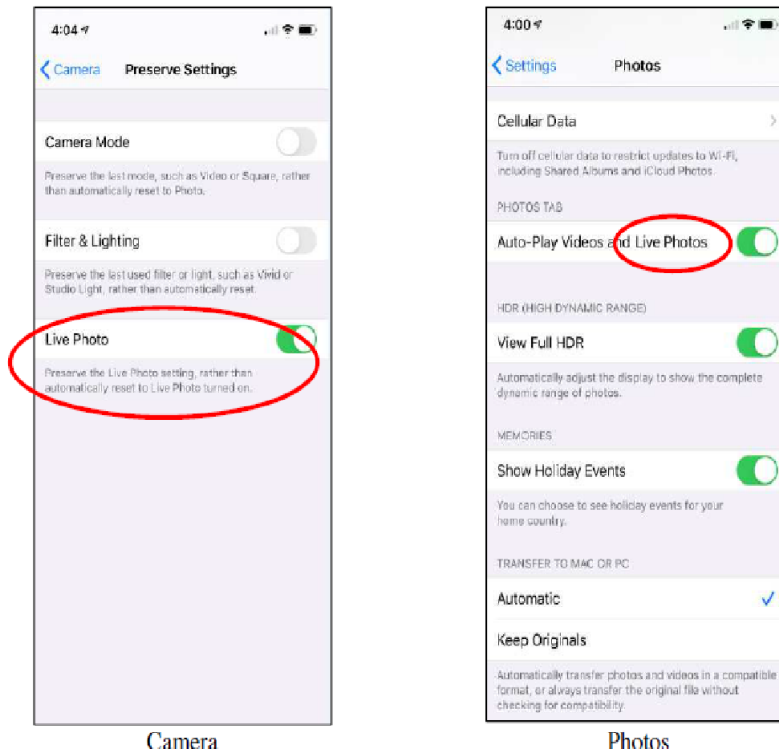
West Fla. Seafood, Inc. v. Jet Rests., Inc., 31 F.23d 1122, 31 USPQ2d 1660, 1663 (Fed. Cir. 1994) (when various documents point to the same results there is a sufficient indication of reliability). *Cf. Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015) (“The ‘specifics’ as to the extent and impact of use of the third parties’ marks may not have been proven, but in the circumstances here [a considerable number of third-party use], Juice Generation’s evidence is nonetheless powerful on its face.”).

While there is voluminous evidence of third-party use of the term “Live Photo(s),” neither party introduced survey evidence of consumer understanding, letters or testimony from consumers, or affidavits from consumers showing generic use or user understanding of “Live Photo(s).” Also, there is no testimony or evidence regarding the practice in the industry for branding software functionality.

Applicant’s own use of the term “Live Photo(s)” includes substantial use to refer to the simulated moving photograph resulting from the software, such that consumers will perceive “Live Photo(s)” to be a thing (i.e., a generic term for simulated moving photographs produced by an app). For example,

- When users encounter “Live Photos” in settings, as reproduced below, “Live Photos” is displayed along with “Camera Mode,” “Filters & Lighting,” “Cellular Data,” “Auto-Play Videos,” “View Full HDR,” and “Selfies.” Consumers are unlikely to perceive “Live Photos” as a source indicator while operating the software.¹⁵⁶

¹⁵⁶ La Perle Testimony Decl. ¶43 (49 TTABVUE 19).



• Applicant's specimen is an excerpt from a webpage. It is not clear whether the blue "Buy" tab in the upper right hand corner refers to LIVE PHOTOS brand software or something else such as a camera app for a "Live Photo" function. In this regard, "Live Photo" is listed as a camera feature in Applicant's technical specifications along with "12-megapixel camera," "Autofocus with Focus Pixels," "Optimal image stabilization," etc.¹⁵⁷ An average consumer is unlikely to understand that "Live Photo(s)" is a trademark when it is presented as part of a list of features including other generic terms.

• The manner in which Applicant displays the term "Live Photo(s)" in its advertising also leaves doubt as to its status. We note that Applicant highlights the

¹⁵⁷ 52 TTABVUE 158.

trademark status of “Live Photo(s)” by presenting the “L” in “Live” and “P” in “Photos” in upper case letters. However, Applicant’s use of the upper case letters “L” and “P” is not so distinctive as to capture the attention of consumers’ eyes. There is no testimony or other evidence as to how consumers perceive Applicant’s use of the term “Live Photo(s).” Based on the evidence on record, including Applicant’s other use of upper case lettering, upper case lettering alone does transform a generic or descriptive term into an inherently distinctive term. *See In re Noon Hour Food Prods., Inc.*, 88 USPQ2d 1772, 1773 n.2 (TTAB 2008).

Assuming *arguendo* consumers understand the use of upper case letters signifies trademark status,¹⁵⁸ Applicant’s use of “Live Photo(s)” often signifies a thing, rather than a source. In the excerpt from Applicant’s website (support.apple.com) reproduced below consumers may perceive “Live Photos” as a software feature rather than the source of the software feature.¹⁵⁹ Applicant does not use “Live Photo(s)” in the manner of a mark for its feature or app -- Live Photos app. Therefore, there is nothing that engenders the commercial impression of “Live Photo(s)” brand software on which consumers could base a perception of “Live Photo(s)” as a trademark.

¹⁵⁸ As noted above, there is no direct evidence of consumer perception. In addition, we should not place determinative weight on the use of upper-case or lower-case letters. *See Zimmerman v. Nat’l Assn. of Realtors*, 70 USPQ2d 1425, 1434 (TTAB 2004).


¹⁵⁹ 52 TTABVUE 49. *See also* 34 TTABVUE 149-152.


Take and edit Live Photos

Capture photos that come alive when you touch them. Then you can pick a different key photo, add a fun effect, edit your Live Photo, and share with your family and friends. All from your iPhone 6s and later.

Take a Live Photo

Live Photos records what happens 1.5 seconds before and after you take a picture. What you get is more than a great photo: a moment captured with movement and sound. You take a Live Photo just like you do a traditional photo.

1. Open the Camera app.
2. Make sure that your Camera is [set to photo mode](#) and Live Photos is turned on.
3. Hold your iPhone still.
4. Tap .

Live Photos is on by default on your [iPhone 6s and later](#). If you want to [take a still image instead](#), tap  to turn off Live Photos. You can preserve your Camera settings so that Live Photos is always on or off. Go to Settings > Camera > Preserve Settings.



Likewise, in the excerpt from Opposer’s website advertising “Photos for macOS” (apple.com/macos/photos/) reproduced below, the term “Live Photos” is part of the text and it is not set apart from other terms such as “the Loop effect,” “Bounce,” and “Long Exposure.”¹⁶⁰

Bring even more life to your Live Photos. When you edit a Live Photo, the Loop effect can turn it into a continuous looping video that you can experience again and again. Try Bounce to play the action forward and backward. Or choose Long Exposure for a beautiful DSLR-like effect to blur water or extend light trails. You can also trim, mute, and select a key photo for each Live Photo.

Based on Applicant’s use of the term “Live Photos,” consumers are not likely to perceive “Live Photo(s)” as a source indicator or trademark for “computer software

¹⁶⁰ 52 TTABVUE 57.

for recording and displaying images, video and sound” and the resulting simulated moving photographs.¹⁶¹

On the other hand, there is ample un rebutted evidence of third-party app developers using the term “Live Photo(s)” to identify or describe software used to produce simulate moving photographs. For example,

- “Camera MX – Free Photo & Video Camera” app (“Live Photos for Android”);¹⁶²
- Live Motion Picture – Live Photo & Video Animation app;¹⁶³
- Live Photo app;¹⁶⁴
- VIMAGE app;¹⁶⁵
- PixaMotion Loop Photo Animator & Photo Video Maker app (Make live photos, live wallpapers, moving Backgrounds & themes with animation effects using PixaMotion photo animator.”);¹⁶⁶
- Autumn Leaves Wallpaper app using (“Create your live photo wallpaper with effects!”);¹⁶⁷
- VUO – Cinemagraph, Live Photo & Photo in Motion app;¹⁶⁸ and

¹⁶¹ Applicant’s use of “Live Photo(s)” in its patent application also supports this finding. 34 TTABVUE 154-166.

¹⁶² 34 TTABVUE 100.

¹⁶³ 34 TTABVUE 168.

¹⁶⁴ 34 TTABVUE 172.

¹⁶⁵ 34 TTABVUE 201.

¹⁶⁶ 37 TTABVUE 17.

¹⁶⁷ 38 TTABVUE 117.

¹⁶⁸ 38 TTABVUE 97.

- Live Photo LWP app.¹⁶⁹

In addition, the record shows that at least five app developers that used the term “Live Photo(s)” at one time. There is no record evidence as to why they stopped.¹⁷⁰ We list those app developers below:

- Live Photo Editor app;¹⁷¹
- Live Photo on Motion app;¹⁷²
- Live Photo - Movenese app;¹⁷³
- musical.ly Live Photo app;¹⁷⁴ and
- TikTok Live Photo app.¹⁷⁵

Finally, authors and reviewers use the term “Live Photo(s)” as a generic term. At best, a few authors and reviewers may allude to “Live Photo(s)” as emanating from Applicant but a reader (i.e., a consumer) would have to know that “Live Photo(s)” is a trademark; a reader/consumer will not perceive “Live Photo(s)” as a trademark based on encountering that term in third-party publications.¹⁷⁶ As noted above,

¹⁶⁹ 38 TTABVUE 97.

¹⁷⁰ There is no testimony or other evidence that Applicant lodged any objections to third-party use of the term “Live Photo(s).”

¹⁷¹ 34 TTABVUE 176.

¹⁷² 34 TTABVUE 181.

¹⁷³ 34 TTABVUE 184.

¹⁷⁴ 34 TTABVUE 189.

¹⁷⁵ 34 TTABVUE 197. While this webpage has changed, the app developer continues to use the term “Live Photo” in text. 68 TTABVUE 6.

¹⁷⁶ We found only one document where a third-party writer referred to “Live Photos” as a brand: “How One Small Change To Apple iPhone 6 Revolutionizes Photography,” Forbes (forbes.com) (September 15, 2015) (“I think that’s exactly what [Applicant] has done with the

Applicant's own use of "Live Photo(s)" is ambiguous and, thus, does not clearly convey to consumers that "Live Photo(s)" is a source indicator rather than the generic name of a feature of Applicant's camera app.

Third-party authors and reviewers are even less clear in their usage of the term "Live Photo(s)." Applicant introduced into evidence a news article "Finding the Perfect Part of a Live Photo," The New York Times (January 9, 2018) to show that "Live Photo(s) is not a generic or descriptive term. We produce below the beginning of the article:

Q. How can I retrieve a still photo from the 1.5 seconds of an iPhone Live Photo before or after the official picture?

A. Live Photos – [Applicant's] format that captures a bit of the subjects movement right before and after the "official" picture – can be edited. ...

Open the Photos app on the iPhone and find the image you want to edit. Live Photos are also collected in their own Live Photos album on the app's Albums tab. After you open the file, tap the Edit button in the upper-right hand corner of the screen. The picture opens in the Edit mode, where the familiar tools for cropping and enhancing the photo are available.¹⁷⁷

This author refers to "Live Photo(s)" as the common name of a thing (e.g., a feature, format, or function) rather than as indicating a product emanating exclusively from

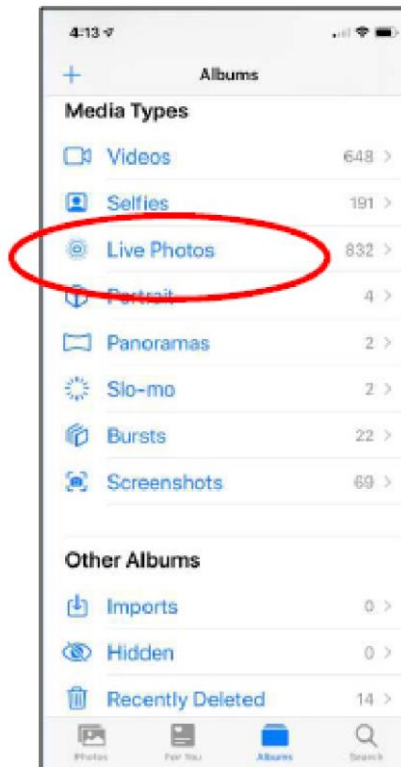
camera feature on the iPhone 6s, more specifically something it has branded Live Photos." 53 TTABVUE 40).

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¹⁷⁷ 53 TTABVUE 242.

Applicant. For example, consumers may interpret “iPhone Live Photo” as “iPhone (brand) Live Photo (product).”

The fact that the author used upper-case letters when referring to “Live Photo(s)” is irrelevant in this article because the author uses upper-case letters when referring to “Albums” and “Edit.” The reader will not take away that “Live Photos” is a trademark based on the use of upper-case letters unless the consumer also perceives “Albums” and “Edits” as Applicant’s trademarks. We find this highly unlikely. As noted above, when “Live Photos” appears in the Photos app under “Albums,” as reproduced below, “Live Photos” is listed as one of eight features, including “Videos,” “Selfies,” “Portrait,” “Panoramas,” “Slo Mo,” “Bursts,” and “Screenshots.”¹⁷⁸



¹⁷⁸ La Perle Testimony Decl. ¶44 (49 TTABVUE 19-20).

Applicant contends that Opposer “has not shown that the relevant public understands software that records videos, image and sound together as ‘Live Photo(s).’”¹⁷⁹ We disagree. First, as discussed above, the genus at issue “computer software for recording and displaying images, video and sound,” including the resulting images, video and sound produced by the software.

Second, the evidence shows that consumers perceive “Live Photo(s)” as the common name for a picture that incorporates video. For example,

- “Without further ado, here are some Android apps that offer live photos feature or similar, or even better.”¹⁸⁰
- “Perhaps the easiest to use, Graphica Live Photo Maker pretty much does what the name suggests, launching quickly with a menu offering the ability to take a Quick Live Photo, create animations from previous photos on your phone with Gallery Live Photo and also take a Live Photo with Frame.”¹⁸¹
- “By ‘moments,’ I mean Clips captures ‘live’ photos by default, 7-second videos similar to the one’s [Applicant’s] iPhones take.”¹⁸²

The closest we come to direct consumer evidence is the excerpts from forums introduced by Applicant and set forth below:

- “How to backup live photos from the G7,” on the XDA Developers website (forum.xda-developers.com) (September 27, 2018).

¹⁷⁹ Applicant’s Brief p. 38 (74 TTABVUE 40).

¹⁸⁰ 34 TTABVUE 38.

¹⁸¹ 34 TTABVUE 57.

¹⁸² 34 TTABVUE 81.

I decided to try out the live photos function in the camera app as it could be fun to have some short video clips when taking pictures of our dog etc¹⁸³

- “P9 Lite – Live Photos?” on the XDA Developers website (forum.xda-developers.com) (October 16, 2017).

Hello folks,

Does somebody know if Live Photos (like Samsung S7.8 and iPhone Camera) feature is available of P9 Lite?¹⁸⁴

- “Zoe (live) Photos?” posted on the Android Central website (forums.androidcentral.com).

returnmyjedi

I’ve been enjoying my Red U11 for a few days now (especially the superb music playback and speediness it exhibits compared to the S7 Edge it replaced) but I’m missing the live photos. My wife had an M7 which had HTC’s Zone photos, but I can’t find the option on the U11.¹⁸⁵

- “Live Photo,” on the Android Central website (forums.androidcentral.com).

heavyvino

What is the easiest way to get a single photo out of a live photo series?

bbgsuser

By “live photo” do you mean the burst you get when you hold down the shutter button?¹⁸⁶

¹⁸³ 36 TTABVUE 98-99.

¹⁸⁴ 36 TTABVUE 107.

¹⁸⁵ 35 TTABVUE 148.

¹⁸⁶ 35 TTABVUE 97.

- “Live Photos,” on the Android Forums website (androidforums.com).

I’ve released an app that allows you to view your photos (or any folder containing images) on your wallpaper [illegible] ... It’s fully configurable, so you can set it up just the way you want it. e.g. You can set the transition times, delay [illegible]. Just search for “Live Photos” on the android market to check it out.

It’s presently on sale at [illegible].¹⁸⁷

In addition, because “living” is a variant of “live,” the third-party use of “living photo(s)” set forth above also corroborates that consumers understand “live photo(s)” and “living photo(s)” to refer to photos that incorporate video.

Applicant argues that “Live Photo(s)” is not generic because, with the exception of the Computer Desktop Encyclopedia, “Live Photo(s)” dictionaries do not define the term. Although there is no dictionary definition for “Live Photo(s)” as a whole, that is by no means dispositive. *See In re Gould Paper Corp.*, 834 F.2d 1017, 1 USPQ2d 1110, 1111 (SCREENWIPE held generic even though there was no dictionary definition of the compound term); *Frito-Lay North America, Inc. v. Princeton Vanguard, LLC*, 109 USPQ2d 1949, 1959 (TTAB 2014), *rev’d on other grounds, Princeton Vanguard, LLC v. Frito-Lay N. Am., Inc.*, 786 F.3d 960, 114 USPQ2d 1827, 1833 (Fed. Cir. 2015) (PRETZEL CRISPS found generic for “pretzel crackers” although no dictionary definition exists for the combined term); *In re Dairimetics, Ltd.*, 169 USPQ 572, 573 (TTAB 1971) (ROSE MILK refused registration on the Supplemental Register even

¹⁸⁷ 36 TTABVUE 103.

though there was no dictionary definition of ROSE MILK). As noted above, the Computer Desktop Encyclopedia defines “Live Photos) as an “iPhone camera feature.”

Applicant argues, in essence, that “Live Photo(s)” is not generic because it was the first entity to use the term and “Live Photo(s) was not generic when Applicant adopted it.¹⁸⁸ First, we are not limited to determining the status of a term as of the date it was first adopted. “To determine if a mark is generic, we examine the evidence up through the time of trial.” *Alcatraz Media Inc. v. Chesapeake Marine Tours, Inc.*, 107 USPQ2d 1750, 1758 (TTAB 2013).

In addition, the fact that an applicant may be the first or only user of a generic designation does not justify registration if the only significance conveyed by the term is that of a category of goods. *In re Empire Tech, Dev. LLC*, 123 USPQ2d 1544, 1549 (TTAB 2017) (citing *In re Greenliant Systems Ltd.*, 97 USPQ2d 1078, 1083 (TTAB 2010). *See also In re Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 828 F.2d 1567, 1569, 4 USPQ2d 1141, 1142 (Fed. Cir. 1987) (“To allow trademark protection for generic terms, *i.e.*, names which describe the genus of goods being sold, even when these have become identified with a first user, would grant the owner of the mark a monopoly, since a competitor could not describe his goods as what they are.”).

Applicant cites three news articles to support its contention that “Live Photo(s)” was not generic when it first adopted the term. We reproduce below excerpts from the articles:

¹⁸⁸ Applicant’s Brief, p. 39 (74 TTABVUE 41).

- “[Applicant’s] new Live Photos feature turns your pictures into videos,” The Verge website (theverge.com) (September 9, 2015).¹⁸⁹

Phil Schiller announced a few new iPhone camera tricks at today’s Apple event, but one of the strangest was something called “Live Photos.” Think of it as a something between automatic GIFs and short video clips.

Every picture you take with the new iPhone 6S or 6S Plus is, by default, also a Live Photo. The camera app captures a second and a half on either side of the photo that you take, and when you tap the photo it will animate. ...

Apple says that Live Photos will be supported across all Apple products, showed off being used as wallpaper on your iPhone or Apple Watch. It’s not necessarily a new idea – HTC did this with its “Zoe” camera mode, and others have tried similar feats – but Apple has the advantage of building Live Photos into one of the world’s most popular phones (and cameras).¹⁹⁰

- “Why We Keep Buying Each New iPhone,” The Wall Street Journal (September 23, 2015).¹⁹¹

And now, on the iPhone 6s, there’s Live Photos, a groovy new tool for self-expression. It captures a three-second burst of video around a photo. But you can only share these with other Apple device owners.¹⁹²

- “Review: Apple’s iPhone 6s And 6s Plus Go ‘Tick’,” on the Tech Crunch website (techcrunch.com).¹⁹³

¹⁸⁹ 53 TTABVUE 33.

¹⁹⁰ 53 TABVUE 34-35.

¹⁹¹ 53 TTABVUE 149.

¹⁹² 53 TTABVUE 150.

¹⁹³ 53 TTABVUE 454.

Webpage image



Sights And Sounds

Live Photos are not really a new format. The images, which are accompanied by 3 seconds of video (split before and after your shot) are stored as a .jpg file on your iPhone. ... The appearance to the user is seamless, as iOS sees that they are connected and presents them as on 'Live Photo.'

In my experience, Live Photos work best when capturing *ambience*, not *action*.¹⁹⁴

Until Live Photos, there was no easy way for any normal person to share both of those things at once in one go – a crystal-clear still image, with a sense of place attached. I could go on about Live Photos, I find them to be very, very powerful, but I think that the best uses of them are still undiscovered.¹⁹⁵

These three articles refer to "Live Photo(s)" as a thing ("something between automatic GIFs and short video clips," "a groovy new tool for self-expression," and "a new format"). Consumers reading about Applicant's new "Live Photo(s)" feature will not perceive "Live Photos" as a trademark based on the above-noted news articles.

¹⁹⁴ 53 TTABVUE 51-52.

¹⁹⁵ 53 TTABVUE 53-54.

We find that the evidence of record in its entirety proves that consumers perceive the term “Live Photo(s)” as a generic term for “computer software for recording and displaying images, video and sound,” including the resulting images, video and sound produced by the software. As Judge Rich explained in *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 219, 219 (CCPA 1978) (Rich, J., concurring) (emphasis in original), a term that immediately and unequivocally describes the purpose and function of appellant’s goods is a name for those goods, for “[t]hat is what *names* do. They tell you what the thing *is*.” The evidentiary record as a whole proves that consumers perceive the term “Live Photo(s)” as a thing, not a source.

We sustain the opposition on the ground that the term “Live Photo(s)” used in connection with “computer software for recording and displaying images, video and sound,” including the resulting images, video and sound produced by the software is generic.

V. Whether “Live Photos” is merely descriptive.

We now address the alternative ground of opposition to register LIVE PHOTOS — that, if LIVE PHOTOS is not generic, it nonetheless is merely descriptive and has not acquired distinctiveness. Although we have found LIVE PHOTOS to be generic for “computer software for recording and displaying images, video and sound,” including the resulting images, video and sound produced by the software, we analyze this alternative ground in the event a reviewing court finds on appeal that LIVE PHOTOS is not generic.

Implicit in our holding that the evidence before us establishes that “Live Photos” is generic for “computer software for recording and displaying images, video and

sound,” including the resulting images, video and sound produced by the software is a finding that “Live Photos” is not only merely descriptive of Applicant’s identified goods, but is highly descriptive of the goods, under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 2(e)(1). “The generic name of a thing is in fact the ultimate in descriptiveness.” *Bellsouth Corp. v. DataNational Corp.* 60 F.3d 1564, 35 USPQ2d 1554, 1557 (Fed. Cir. 1995) (quoting *Marvin Ginn*, 228 USPQ at 530); *Weiss Noodle*, 129 USPQ at 413 (“The name of a thing is the ultimate in descriptiveness. ... It is immaterial that the name is in a foreign language.”). *See also In re Automated Mktg. Sys., Inc.*, 873 F.2d 1451, 11 USPQ2d 1319, 1320 (Fed. Cir. 1989) (after finding SALES FOLLOW-UP for soliciting repeat and referral business for automobile dealership services generic, “the highly descriptive nature of ‘SALES FOLLOW-UP’ outweighed [applicant’s] evidence of acquired distinctiveness.”); *In re Noon Hour Food Prods., Inc.*, 88 USPQ2d 1172 (TTAB 2008) (finding, despite applicant’s claim of use in commerce for almost one hundred years, as well as an “inadvertently cancelled” seventy-year-old registration for the mark BOND-OST for cheese, current evidence clearly showed the mark was generic for the goods, and assuming arguendo that BOND-OST is not generic, that applicant had failed to establish acquired distinctiveness of the highly descriptive mark); *In re Waverly Inc.*, 27 USPQ2d 1620, 1623 (TTAB 1993) (finding MEDICINE not generic, but a highly descriptive term that had acquired distinctiveness, for medical journals).

Nevertheless, Applicant contends that “Live Photos” is inherently distinctive – at a minimum suggestive of the applied-for-goods – and therefore is entitled to

registration without any showing of secondary meaning. Accordingly, if a reviewing court on appeal finds “Live Photos” is not generic, then it is incumbent upon us to determine whether “Live Photos” is merely descriptive.

In the absence of acquired distinctiveness, Section 2(e)(1) of the Trademark Act precludes registration of a mark on the Principal Register that, when used in connection with an applicant’s goods, is merely descriptive of them. 15 U.S.C. § 1052(e)(1). “A mark is merely descriptive if it immediately conveys information concerning a feature, quality, or characteristic of the goods or services for which registration is sought.” *Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1373 (Fed. Cir. 2018) (quoting *In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1709 (Fed. Cir. 2017)).

We “must consider the mark as a whole and do so **in the context of the goods or services at issue.**” *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012) (emphasis added); *In re Calphalon Corp.*, 122 USPQ2d 1153, 1162 (TTAB 2017). “Whether consumers could guess what the product is from consideration of the mark alone is not the test.” *In re Am. Greetings Corp.*, 226 USPQ 365, 366 (TTAB 1985). Rather, “the question is whether someone who knows what the goods and services are will understand the mark to convey information about them.” *DuoProSS*, 103 USPQ2d at 1757 (quoting *In re Tower Tech, Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002)).

The evidence discussed above used in analyzing whether “Live Photo(s)” is a generic term also shows that “Live Photos” is merely descriptive when used in

connection with “computer software for recording and displaying images, video and sound.” The evidence of third-party use shows that “Live Photos” is merely descriptive because it demonstrates that “Live Photos” has a normally understood and recognized descriptive meaning. *See Specialty Brands, Inc. v. Coffee Bean Distrib., Inc.*, 748 F.2d 669, 223 USPQ 1281, 1285 (Fed. Cir. 1984) (“third-party usage can demonstrate the ordinary dictionary meaning of a term or the meaning of a term to those in the trade”) (citing *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693, 694-95 (CCPA 1976)); *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978) (“Evidence of the context in which a mark is used on labels, packages, or in advertising material directed to the goods is probative of the reaction of prospective purchasers to the mark.”). *Cf. Juice Generation*, 115 USPQ2d at 1674 (third-party use and registration of a term may be an indication that a term has a suggestive or descriptive connotation in a specific industry); *Primrose Retirement Communities, LLC v. Edward Rose Senior Living, LLC*, 122 USPQ 1030, 1036 (TTAB 2016) (evidence of third-party use in the relevant context may show that a term “may have a normally understood and well-recognized descriptive or suggestive meaning”).

We find that consumers commonly use “Live Photos” to describe “computer software for recording and displaying images, video and sound” and the simulated moving photographs the software produces and, therefore, “Live Photos” is not only merely descriptive but it is highly descriptive of such goods.

VI. Acquired Distinctiveness

Pursuant to Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f), matter that is merely descriptive under Section 2(e)(1) may nonetheless be registered on the

Principal Register if it “has become distinctive of the applicant’s goods in commerce.” Thus, assuming that Applicant’s mark is not generic, Applicant may register its mark on the Principal Register if Applicant proves that the merely descriptive matter has acquired distinctiveness (also known as “secondary meaning”) as used on Applicant’s goods in commerce. *See Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1728-30 (Fed. Cir. 2012); *Apollo Med. Extrusion Techs.*, 123 USPQ2d at 1848.

We generally understand acquired distinctiveness to mean an acquired “mental association in buyers’ minds between the alleged mark and a single source of the product.” *Apollo Med. Extrusion Techs.*, 123 USPQ2d at 1848 (quoting 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 15:5 (4th ed., June 2017 Update)). In analyzing whether the record shows “Live Photos” is generic or merely descriptive with a high degree of descriptiveness, we considered all of the evidence of record touching on the public perception of that term as discussed above and more fully below.

An applicant seeking registration of a mark under Section 2(f) bears the ultimate burden of establishing acquired distinctiveness. *See In re Becton, Dickinson & Co.*, 675 F.3d 1368, 102 USPQ2d 1372, 1377 (Fed. Cir. 2012); *Yamaha Int’l Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 1577, 6 USPQ2d 1001, 1005-06 (Fed. Cir. 1988). As noted above, Applicant’s burden increases with the level of descriptiveness. *Steelbuilding.com*, 415 F.3d 1293, 75 USPQ2d 1420, 1424 (Fed. Cir. 2005). *See also In re Bos. Beer Co. L.P.*, 198 F.3d 1370, 53 USPQ2d 1056, 1058 (Fed. Cir. 1999)

("[C]onsidering the highly descriptive nature of the proposed mark, [Applicant] has not met its burden to show that the proposed mark has acquired secondary meaning.").

Because we have found that the term "Live Photos" is highly descriptive of Applicant's goods, Applicant's burden of establishing acquired distinctiveness under Section 2(f) is commensurately high. *See Steelbuilding.com*, 75 USPQ2d at 1424; *In re Bongrain Int'l Corp.*, 894 F.2d 1316, 13 USPQ2d 1727, 1729 (Fed. Cir. 1990); *In re Greenliant Sys. Ltd.*, 97 USPQ2d, 1078, 1085 (TTAB 2010).

To establish acquired distinctiveness, Applicant must demonstrate that relevant consumers perceive the proposed mark at issue as identifying the producer or source of the product. *See Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 54 USPQ2d 1065, 1068 (2000) (acquired distinctiveness exists "when, in the minds of the public, the primary significance of a [proposed mark] is to identify the source of the product rather than the product itself") (citation and internal quotation marks omitted); *Stuart Spector Designs Ltd. v. Fender Musical Instruments Corp.*, 94 USPQ2d 1549, 1554 (TTAB 2009) ("An applicant must show that the primary significance of the product configuration in the minds of consumers is not the product but the source of that product in order to establish acquired distinctiveness.").

Applicants may show acquired distinctiveness by direct or circumstantial evidence. *Schlaflly v. Saint Louis Brewery, LLC*, 909 F.3d 420, 128 USPQ2d 1739, 1743 (Fed. Cir. 2018) ("The Board and courts have recognized that both direct and circumstantial evidence may show secondary meaning.") (citation omitted); *In re*

Ennco Display Sys., 56 USPQ2d 1279, 1283 (TTAB 2000). Direct evidence includes testimony, declarations or surveys of consumers as to their state of mind. *Ennco Display Sys.*, 56 USPQ2d at 1283. Circumstantial evidence, on the other hand, is evidence from which we may infer a consumer association, such as years of use, prior registrations, extensive sales and advertising, unsolicited media coverage, and any similar evidence showing wide exposure of the mark to consumers. *Id.*; *see also Tone Bros. v. Sysco Corp.*, 28 F.3d 1192, 31 USPQ2d 1321 (Fed. Cir. 1994) (listing, as examples of circumstantial evidence, advertising, sales figures, and intentional copying by competitors).

In particular, the Federal Circuit set out factors to consider in assessing whether a mark has acquired distinctiveness, stating as follows:

[T]he considerations to be assessed in determining whether a mark has acquired secondary meaning can be described by the following six factors: (1) association of the trade[mark] with a particular source by actual purchasers (typically measured by customer surveys); (2) length, degree, and exclusivity of use; (3) amount and manner of advertising; (4) amount of sales and number of customers; (5) intentional copying; and (6) unsolicited media coverage of the product embodying the mark.

Converse, Inc. v. Int'l Trade Comm'n, 909 F.3d 1110, 128 USPQ2d 1538, 1546 (Fed. Cir. 2018). *See also In re SnoWizard, Inc.*, 129 USPQ2d 1001, 1004-05 (TTAB 2018). On this list, no single factor is determinative and “[a]ll six factors are to be weighed together in determining the existence of secondary meaning.” *In re Guaranteed Rate, Inc.*, 2020 USPQ2d 10869, at *3 (TTAB 2020) (quoting *Converse*, 128 USPQ2d at 1546); *In re Tires, Tires, Tires Inc.*, 94 USPQ2d 1153, 1157 (TTAB 2009). *See also Ennco Display Sys.*, 56 USPQ2d at 1283 (“Direct evidence [of acquired

distinctiveness] includes actual testimony, declarations or surveys of consumers as their state of mind. Circumstantial evidence, on the other hand, is evidence from which consumer association might be inferred, such as years of use, extensive amount of sales and advertising, and any similar evidence showing wide exposure of the mark to consumers.”).

1. Association of the proposed trademark with a particular source by actual purchasers (typically measured by customer surveys).

There is no testimony or other evidence by actual purchasers, nor is there a consumer survey.

2. Length, degree, and exclusivity of use.

On September 9, 2015, Applicant introduced the iPhone 6 and the “Live Photos” feature and first offered it for sale on September 25, 2015.¹⁹⁶ Applicant has continuously used “Live Photos,” in part, by preloading it in every iPhone model as well as on iPad devices.¹⁹⁷ However, as discussed above, consumers will perceive “Live Photos” to be a generic term based on the manner in which Applicant uses it on its iPhone cellphone.

Applicant’s use of the term “Live Photos” has not been exclusive. As discussed above in our analysis of whether “Live Photos” is generic, we found unrebutted evidence of third-party app developers using the term “Live Photo(s)” to identify or describe software used to produce simulate moving photographs. For example,

¹⁹⁶ La Perle Cross-examination Dep., p. 12 (63 TTABVUE 16); La Perle Testimony Decl. ¶¶10, 17 (49 TTABVUE 4, 6).

¹⁹⁷ La Perle Testimony Decl. ¶¶40, 41 (49 TTABVUE 18).

- “Camera MX – Free Photo & Video Camera” app (“Live Photos for Android”);¹⁹⁸
- Live Motion Picture – Live Photo & Video Animation app;¹⁹⁹
- Live Photo app;²⁰⁰
- VIMAGE app;²⁰¹
- PixaMotion Loop Photo Animator & Photo Video Maker app (Make live photos, live wallpapers, moving Backgrounds & themes with animation effects using PixaMotion photo animator.”);²⁰²
- Autumn Leaves Wallpaper app using (“Create your live photo wallpaper with effects!”);²⁰³
- VUO – Cinemagraph, Live Photo & Photo in Motion app;²⁰⁴ and
- Live Photo LWP app.²⁰⁵

In addition, the record shows that at least five app developers used the term “Live Photo(s)” at one time. We list those app developers below:

- Live Photo Editor app;²⁰⁶

¹⁹⁸ 34 TTABVUE 100.

¹⁹⁹ 34 TTABVUE 168.

²⁰⁰ 34 TTABVUE 172.

²⁰¹ 34 TTABVUE 201.

²⁰² 37 TTABVUE 17.

²⁰³ 38 TTABVUE 117.

²⁰⁴ 38 TTABVUE 97.

²⁰⁵ 38 TTABVUE 97.

²⁰⁶ 34 TTABVUE 176.

- Live Photo on Motion app;²⁰⁷
- Live Photo - Movenese app;²⁰⁸
- musical.ly Live Photo app;²⁰⁹ and
- TikTok Live Photo app.²¹⁰

Finally, the record shows that third-party writers and reviewers use the term “Live Photos” to describe apps that produce moving images.

We find that Applicant has not made substantially exclusive use of the term “Live Photos.”

3. Amount and manner of advertising.

[Applicant] advertises and markets its products extensively throughout the United States across a range of mediums, including TV, print, billboards, and through its website at apple.com. These advertising efforts have included the promotion of the LIVE PHOTOS software feature throughout the United States via a wide variety of advertising channels.²¹¹

Applicant advertises the “Live Photos” software feature in connection with its iPhone, iPad, and other devices “with direct reference to core features within those devices, including the LIVE PHOTOS software feature.”²¹² However, Applicant

²⁰⁷ 34 TTABVUE 181.

²⁰⁸ 34 TTABVUE 184.

²⁰⁹ 34 TTABVUE 189.

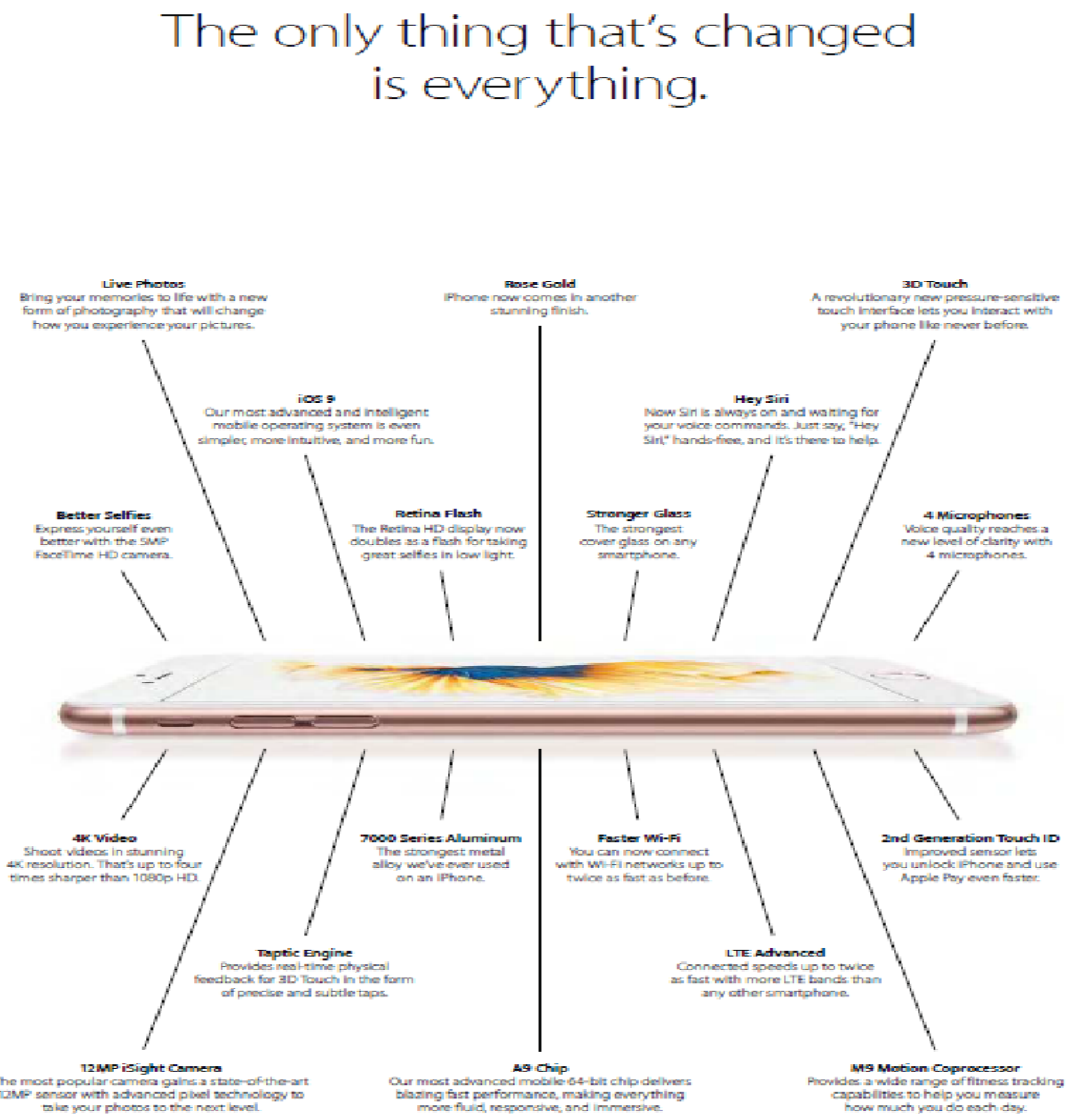
²¹⁰ 34 TTABVUE 197. While this webpage has changed, the app developer continues to use the term “Live Photo” in text. 68 TTABVUE 6.

²¹¹ La Perle Testimony Decl. ¶24 (49 TTABVUE 10).

²¹² La Perle Testimony Decl. ¶34 (49 TTABVUE 14).

preinstalls “Live Photos” on Applicant’s iPhones,²¹³ it is not clear whether and the extent to which they are aware of the “Live Photos” software and whether it plays a role in their decision to purchase an iPhone.

La Perle specifically referred to the advertisement reproduced below as “highlighting” Live Photos:²¹⁴



²¹³ La Perle Testimony Decl. ¶34 (49 TTABVUE 14).

²¹⁴ La Perle Testimony Decl. ¶35 Exhibit 31 (49 TTABVUE 14, 15 and 52).

While Applicant identifies “Live Photos” as an iPhone feature, there is nothing that emphasizes that it is a trademark. It is displayed in the same way Applicant displays “Faster WiFi,” “4K Video,” “Better Selfies,” and “Stronger Glass.” Applicant does not use this advertisement to show trademark use of “Live Photos.”

La Perle also referred to the promotion reproduced below:²¹⁵

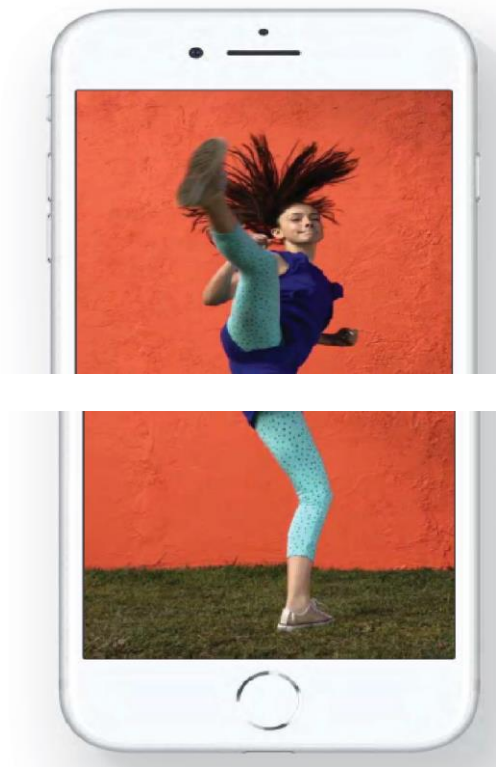
Live Photos. Livelier than ever.

Now your Live Photos can be even more expressive, creative, and just plain fun.

[Learn more about Photos >](#)

[Loop](#) [Bounce](#) [Long Exposure](#)

Turn a Live Photo you love into a fun video loop. Choose an image yourself, or let Photos suggest which ones would make great loops.

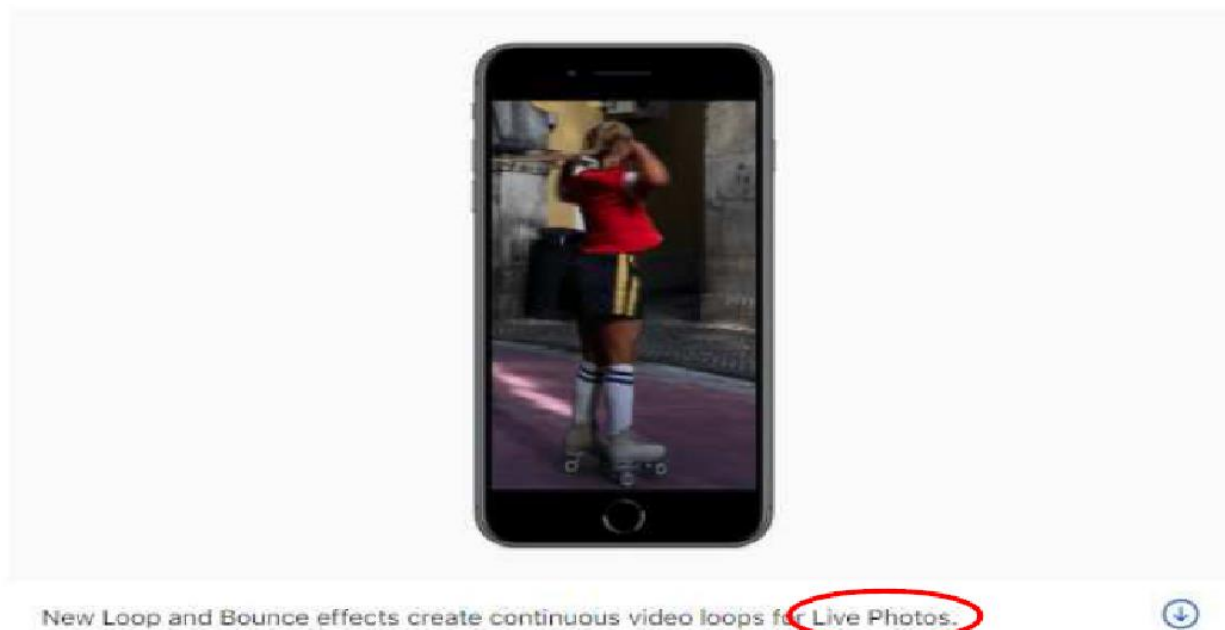


Applicant’s use of “Live Photos” conveys that “Live Photos” is a camera feature; it does not emphasize that “Live Photos” is a trademark for Applicant’s camera software.

²¹⁵ La Perle Testimony Decl. ¶36 (49 TTABVUE 15-16) and 52 TTABVUE 275-276.

Finally, La Perle refers to “Live Photos” as presented in Applicant’s press release of the “iOS 11” operating system.²¹⁶ We reproduce below the relevant excerpt from the advertisement²¹⁷ as presented in the La Perle declaration:²¹⁸

Photos Look Even More Professional



The incredibly popular and innovative Portrait mode now uses optical image stabilization, True Tone flash and HDR, so every shot looks even more professional. Loop and Bounce effects create continuous video loops for Live Photos while Long Exposure creatively captures time and movement. In Photos, Memory Movies are optimized to play in both portrait and landscape orientation, and more memories, such as photos of pets or birthdays, are automatically created.

²¹⁶ 53 TTABVUE 301-308.

²¹⁷ 53 TTABVUE 303.

²¹⁸ La Perle Testimony Decl. ¶37 (49 TTABVUE 16-17).

This excerpt is on one-half page of a seven-page press release. Applicant buries it in the text and fails to highlight or emphasize the term so that consumers recognize it as a trademark. Applicant's use of "Live Photos" fails to convey that "Live Photos" is a trademark.

Applicant's extensive advertising and marketing of its iPhone and iPad devices features "Live Photos" as a feature of the devices. Applicant's advertising and marketing does not promote "Live Photos" as a brand of software exclusively associated with Applicant.

4. Amount of sales and number of customers.

"On September 28, 2015, only three days after the iPhone 6s and iPhone 6s Plus devices went on sale, [Applicant] reported that it had sold more than 13 million of the 6s and 6s Plus models, which were sold with the LIVE PHOTOS software pre-loaded, and that the sales had been phenomenal, exceeding any previous first weekend sales results in [Applicant's] history."²¹⁹ Sales of the iPhone 7 and iPhone 7 Plus also included the LIVE PHOTOS software feature and resulted in record quarterly sales. "Specifically, in the three months following the release of the iPhone 7, [Applicant] sold 78.3 million iPhone devices worldwide."²²⁰ Between 2015 and 2019, Applicant sold hundreds of millions of iPhones with the "Live Photos" feature globally generating hundreds of billions of dollars in revenue.²²¹ Applicant's sales in the U.S.

²¹⁹ La Perle Testimony Decl. ¶21 (49 TTABVUE 21).

²²⁰ La Perle Testimony Decl. ¶48 (49 TTABVUE 21).

²²¹ La Perle Testimony Decl. ¶50 (49 TTABVUE 22).

are approximately 40-45% of its worldwide sales.²²² Applicant's sales figures for its iPad devices featuring the "Live Photos" feature are equally impressive.²²³

La Perle's testimony regarding Applicant's phenomenal sales tells us that Applicant's iPhones and iPads are incredibly popular. It does not tell us how consumers perceive the term "Live Photos," what percentage of consumers are aware that "Live Photos" is a feature of their iPhone or iPad device, or whether the "Live Photos" feature was a factor in their purchasing decision. Because Applicant preinstalls "Live Photos" on its iPhones,²²⁴ "Live Photos" is not an option for consumers to consider when making a purchasing decision.

We glean from the La Perle testimony that the consuming public has been exposed frequently and nationwide to the "Live Photos" feature as part of an iPhone or iPad device. *Cf. Bose Corp. v QSC Audio Prods., Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1309 (Fed. Cir. 2002) (a product mark may be assessed independently for possible fame where the evidence shows the product mark stands apart from the house mark). In this case, however, we cannot separate "Live Photos" from the iPhone or iPad marks and we are unable to assess consumer recognition of "Live Photos" as a trademark.

Applicant's sales and number of customers does not support finding "Live Photos" has acquired distinctiveness.

²²² La Perle Testimony Decl. ¶51 (49 TTABVUE 22-23).

²²³ La Perle Testimony Decl. ¶¶53, 54 (49 TTABVUE 23-24).

²²⁴ La Perle Testimony Decl. ¶34 (49 TTABVUE 14).

5. Intentional copying.

La Perle testified that “numerous entities in the United States and elsewhere have tried to copy [Applicant’s] Mark by adopting trademarks containing the phrase ‘Live Photos’ for their own, unrelated products”²²⁵ and such activities are “intentional efforts to copy [Applicant’s] Mark and trade off [Applicant’s] goodwill.”²²⁶ However, there is no testimony or evidence that any of the third parties using the term “Live Photos” did so to confuse consumers and pass off their products as Applicant’s. In fact, Applicant’s argument stretches credulity when you review the third party uses. If Applicant truly believed that the third parties were intentionally copying Applicant’s trademark to pass off their camera apps as Applicant’s, we would expect that Applicant would have lodged an objection to the infringing use. However, there is no testimony or other evidence that Applicant lodged objections or sent notices to these purported infringers to put them on notice that they were violating Applicant’s proprietary rights. It is far more likely that the third parties are using “Live Photos” to fairly and in good faith describe their apps.

We find there is no evidence of intentional copying.

6. Unsolicited media coverage of the product embodying the mark.

La Perle testified that Applicant’s “Live Photos” feature received substantial unsolicited press coverage and critical acclaim.²²⁷ But the media attention focuses on

²²⁵ La Perle Testimony Decl. ¶68 (49 TTABVUE 31).

²²⁶ La Perle Testimony Decl. ¶69 (49 TTABVUE 31).

²²⁷ La Perle Testimony Decl. ¶¶56-61 (49 TTABVUE 24-29).

iPhones and refers to “Live Photos” in text as a iPhone camera feature. The media attention does not separate “Live Photos” from Applicant or its iPhone trademark. “Live Photos” does not stand apart from Applicant or the iPhone mark. Therefore, it fails to demonstrate independent trademarks significance. *Compare Bose Corp.*, 63 USPQ2d at 1308-09. It is unlikely consumers perceive or understand that “Live Photos” identifies the source of the camera feature when a writer or reviewer refers to Apple’s Live Photo feature.

7. Conclusion.

After considering all of the factors for which there is evidence in determining whether Applicant’s purported mark “Live Photos” has acquired distinctiveness, we find that Applicant has not met its burden of proving “live Photos” has acquired distinctiveness.

Decision: We sustain the opposition to register “Live Photos” on the ground that it is generic.

We sustain the opposition to register “Live Photos” on the ground that it is merely descriptive.

We sustain the opposition to register “Live Photos” on the ground that it has not acquired distinctiveness.